



Department  
for Business  
Innovation & Skills

THE STATE AID MANUAL

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Withdrawn

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# How to use this Manual

This Manual is intended to assist public sector officials understand the State aid rules and how they apply in practice. It brings together in one place guidance on a wide range of State aid-related topics. Some of the material has previously been published separately and has been revised and updated in this document.

Although quite comprehensive, this Manual is not a substitute for the official documentation available on the [EU Commission's website](#)<sup>1</sup>. Officials should always make time to understand the regulations they are using and satisfy themselves that they are compliant. The manual cannot address specific circumstances nor should it be relied upon as definitive advice. The BIS State aid Team would be grateful if readers would bring any errors or significant omissions to their attention so they can be corrected.

The Manual is not meant to be read from beginning to end, but is a source of reference on key aspects of the State aid rules and their application. Those new to State aid should first read the [State aid: the Basics Guide](#), which provides an introduction to thinking about whether a form of assistance is State aid and options for handling this.

The Annexes to the guide provide more detailed guidance on some of the mechanisms for giving State aid and their requirements and information about the legal interpretation of some key State aid decisions which can be used as precedent.

Withdrawal

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<sup>1</sup> [http://ec.europa.eu/competition/state\\_aid/modernisation/index\\_en.html](http://ec.europa.eu/competition/state_aid/modernisation/index_en.html)

# Chapter 1 – An Introduction to State aid

## Why do we need state aid rules?

- 1.1 Rules constraining the use of State aid apply to all members of the EU. The purpose of the State aid regime is to prevent governments from giving financial advantages to firms in a way which could distort competition. This enables British firms to compete on a level playing field with competitors in other EU countries. The ineffective use of State aid in the long run can also lead to a persistence of inefficient and unproductive industries, preventing the emergence of new and more innovative, high growth firms which could deliver better products more cheaply, and so damaging the country's long term prosperity. And of course, if taxpayers' money is not being used to subsidise inefficient enterprises, taxes can be lower or public spending can be increased in other areas, such as health and education. The Government therefore supports the need for effective State aid rules to remove abuses of competition and to create a genuinely open and competitive market.
- 1.2 Not all State aid has such negative effects and the EU's State aid rules allow for types of aid which facilitate delivery of growth and other policy objectives without resulting in distortions of competition. Such aid measures can be deemed to be allowable or "compatible with the Common Market". These include regional aid for disadvantaged regions and aid for "horizontal" purposes (that is, aid that can be paid across all sectors and all of the member state), such as for lowering carbon emissions and other environmental improvements, research, development and innovation and training.
- 1.3 The Commission's State Aid Modernisation (SAM) initiative has resulted in the ability to give much more "good aid" like this more rapidly without the need for prior Commission approval. The Government is working with the European Commission to ensure that its focus continues to be towards scrutinising and tackling the most distortive aids and enabling Member States to rapidly deliver growth-enhancing measures through streamlined State aid decision-making processes.

## An overview of State aid

- 1.4 The definition of State aid is broad. In essence, State aid is an advantage given by public authorities on a selective basis to undertakings (broadly, organisations that put goods or services on a market) which could potentially distort competition and affect trade in the EU. 'An advantage' can take many forms: not just a grant, loan or tax break but also the use of a state asset for free or at less than market price. It must be something which an undertaking could not get on the open market. Please see Figure 1:

**Figure 1- State aid transfer**



- 1.5 State aid can distort competition and disrupt the single market, so as a general rule it is prohibited by the foundation treaties of the European Union. However, there are certain circumstances in which “good” State aid is necessary to deliver policy objectives and can be given legally.
- 1.6 There are a range of legal mechanisms in place to enable public authorities to provide well-targeted, proportionate State aid which does not unduly distort competition.
- 1.7 This manual provides information about how the State aid regime works, understanding the rules, their application to your project or policy and your options for managing State aid issues and risk.
- 1.8 Any organisation using public funding needs to understand the State aid regime as breaches of the rules can have severe consequences; projects may have to be stopped and money provided may have to be clawed back. Potential recipients of public funding are often reluctant to accept assistance unless they are confident that the State aid rules have been adhered to.



### **Think State aid first!**

Most problems arise when State aid issues are not considered and managed at an early stage. The key to working successfully within the State aid rules is to think about how the rules might apply when developing options and plans. You need to consider what the implications may be, particularly in terms of deliverability, timing and uncertainty.

### **How do I assess and understand if and how the State aid rules apply?**

- 1.9 Our [State aid basics guide](#) provides an overview of the assessment of and options for handling State aid. The first question to consider is whether it is caught by the State aid rules at all.

### **Is it State aid? The four tests:**

- 1.10 There are four characteristics, all of which have to be present for assistance to be classified as State aid. These are often referred to as “the four tests” (*Please refer to [Annex A](#) for further clarification on the tests*):
  - 1) The assistance is granted by the state or through state resources.
  - 2) It favours certain undertakings or the production of certain goods
  - 3) It distorts or threatens to distort competition
  - 4) It affects trade between Member States.

- 1.11 If the assistance meets all of these tests it is State aid and you will need to follow the State aid rules to ensure you are compliant with the law.
- 1.12 If one of the tests is not met then the measure is not caught by the State aid rules.
- 1.13 The way these tests should be applied has developed over time and the definition of State aid is quite broad. For information on applying the four tests, please refer to [Annex A](#) and consult [State aid: the Basics](#).
- 1.14 If the tests of aid are all met then it is illegal to provide aid without prior approval from the European Commission, unless an exemption applies.
- 1.15 Broadly, the options for dealing with state aid are as follows (more detailed guidance on each of these is provided later in the manual):
- Redesign the measure so that it is not caught by the rules. Please see [Chapter 3- Non-Aid options](#).
  - Deliver under a block exemption regulation or existing approved aid scheme. Please see [Chapters 4-7](#).
  - Seek and obtain Commission approval. Please see [Chapter 8](#).
- 1.16 The State aid approval process typically takes at least 6-12 months and can be resource intensive and uncertain. State aid administrators should therefore always seek, wherever possible, to ensure measures do not require individual approval by designing them such that they are outside of the State aid rules or compliant with an exemption regulation. With simple adjustments, many potentially incompatible aid measures can be redesigned in a way which still meets policy objectives but which means that approval is easier to obtain or no longer necessary. In turn this means that measures can be delivered more rapidly and with less risk.

### Taking a risk-based approach



In practice it can often be unclear, even to state aid experts, whether the four tests are met. In such cases, it is necessary to undertake a risk assessment in order to understand the risk involved and decide whether this is acceptable and to consider ways in which it could be reduced. Evaluation of State aid risk should be done in consultation with the State aid Team. Further guidance on assessing and managing State aid risk can be found in [Annex E](#).

## The legislative base for State aid controls

- 1.17 The full set of EU legislation on State aid is available on the Commission's website.<sup>2</sup>

<sup>2</sup> [http://ec.europa.eu/competition/state\\_aid/legislation/compilation/index\\_en.html](http://ec.europa.eu/competition/state_aid/legislation/compilation/index_en.html)



## General Prohibition of State aid

- 1.18 [Article 107\(1\)](#)<sup>3</sup> of the Treaty on the Functioning of the European Union (the TFEU) acts as a general ban on State aid. It declares that aid granted through state resources in any form which could distort competition and affect trade by favouring certain undertakings or the production of certain goods is incompatible with the common market unless the Treaty allows otherwise.<sup>4</sup>
- 1.19 [Article 107\(1\)](#) acts as a general ban, but the Treaty does provide exceptions in which aid is or may be deemed compatible with the common market. Further information on making use of these exemptions is provided in this manual. They fall broadly into two categories:

### (1) Aid which is deemed automatically allowable i.e. compatible with the Treaty

- 1.20 Aid categories that the Treaty declares shall be automatically compatible (meaning that the Commission has no discretion to decide whether an exemption ought to be granted): [Article 107\(2\)](#) specifies three types of compatible aid:
- a) social aid granted to individual consumers
  - b) aid to make good damage caused by natural disasters or exceptional occurrences
  - c) and aid to certain areas of Germany affected by the division of Germany.
- 1.21 In practice, cases meeting [Article 107\(2\)](#)<sup>5</sup> rarely arise. In the event that aid meets [107\(2\)](#)<sup>6</sup> it still has to be notified to the Commission and approved to be compatible.

### (2) Aid which requires the approval of the Commission

- 1.22 Aid categories that may be considered allowable i.e. compatible with the Treaty: [Article 107\(3\)](#) allows the possibility of providing State aid to:
- a) Facilitate development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions and competition to an extent contrary to the common interest;
  - b) Promote economic development of areas of abnormally low standard of living or serious unemployment;
  - c) Promote an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

<sup>3</sup> Formerly Article 87(1) [http://ec.europa.eu/competition/state\\_aid/legislation/provisions.html](http://ec.europa.eu/competition/state_aid/legislation/provisions.html)

<sup>4</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E087:EN:HTML>

<sup>5</sup> <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12008E107>

<sup>6</sup> <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12008E107>

- d) Promote culture and heritage conservation;
- e) Other categories of aid the Commission may propose and the Council may specify.

1.23 Article 107(3) states that these categories **may** be compatible. This means there is a legal obligation for public authorities in Europe to get the Commission's approval before granting such aid.

### Commission approval of aid and the “stand still obligation”

1.24 The obligation to gain the Commission's approval for aid measures in advance of granting them arises from Article 108(3) which states that it is each Member State's responsibility to inform the Commission of planned aid measures in advance and to allow sufficient time for the Commission to comment. Article 108(3) also requires each Member State not to implement proposed aid measures until it has received a final decision from the Commission.

### Aid which can be provided without the need for prior approval

1.25 The Commission has established situations in which the notification process can be avoided and approval can be presumed - providing certain conditions are met. In particular:

- a. the [General Block Exemption Regulation](#) (GBER) is a framework that declares specific categories of aid to be compatible with the Treaty if they fulfil certain conditions, thereby exempting them from the requirement of prior notification and Commission approval; and
- b. the [De minimis regulation](#) declares that aid of up to €200,000 over 3 years doesn't distort trade between Member States therefore exempting them from the requirement of prior notification and European Commission approval.

1.26 These Regulations were adopted by the Commission pursuant to Article 107(3) TFEU and allow certain types of compatible aid to be given without prior approval, subject to meeting detailed requirements including reporting obligations (submission of information sheets in the implementation of aid) and maximum aid amounts. The GBER is widely used in the UK. In 2014 the Commission significantly expanded the scope of the GBER with the objective of enabling Member States to design as much as up to 90% of their State aid measures to fit within it.

1.27 **Frameworks and guidelines for approvable aid measures:** The TFEU allows further possibilities for approval of State aid, under specific rules, including:

- a) aid necessary for the operation of the common agricultural policy
- b) aid for public transport services;
- c) aid necessary for undertakings to provide services of general economic interest.

### The Commission's role:

- 1.28 The Commission has wide power to control and monitor State aid:
- 1.29 In considering proposed aid, the Commission will be guided by criteria in published frameworks and guidelines that apply to particular aid categories or purposes and across all Member States.
- 1.30 Only the Commission can decide whether aid is allowable (compatible) or not<sup>7</sup>. It may give approval to (i.e. allow) State aid measures which Member States notify to it.
- 1.31 As noted above, Member States are obliged to notify aid measures in advance and allow sufficient time for the Commission to consider these. The Commission may refuse approval for notified aid measures or require amendments to aid schemes.
- 1.32 Even if a proposed State aid does not precisely fit formal frameworks or guidelines, or is in a category for which there are no relevant published frameworks or guidelines, the Commission may still approve State aid for development of certain economic activities or areas if it considers that it does not affect competition and trade to an extent contrary to the common interest.
- 1.33 This is not to suggest a probability that it will do so. Guidelines are not easily overridden and even where there are no relevant guidelines the case in discussion would have to be very convincing. **If you are considering giving an aid which does not fit within existing guidelines and frameworks it is essential that you discuss this with the BIS State aid team at the earliest possible stage so that we can advise on design, process and handling.**
- 1.34 If there are relevant guidelines Member States are expected to follow these. If a measure does not follow them completely the approval process is likely to be more difficult and there is a greater probability that the Commission will open an Article 108(2) investigation<sup>8</sup> (also referred to as a phase 2 or formal investigation) which lengthens the approval process or that the Commission will require changes to be made before it will approve the aid.

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<sup>7</sup> However, in exceptional circumstances Member States can instead send their proposals to the Council which can approve them acting unanimously – see Article 108(2), third and fourth paragraphs.

<sup>8</sup> See more on Article (108)2 Investigations on the EU Commission's website  
[http://ec.europa.eu/comm/competition/state\\_aid/legislation/rules.html](http://ec.europa.eu/comm/competition/state_aid/legislation/rules.html)

# Chapter 2 – Options for dealing with state aid

## Overview of options for dealing with state aid

2.1. If a measure may constitute State aid, the aid administrator will need to consider the following options (see also Figure 1):

### (1) No aid – (immediate implementation - without Commission approval)

2.1.1. If possible, adapt the proposed measure to **remove the element of State aid** within the meaning of Article 107(1) ([see Chapter 3](#)). It may be less work to adapt the measure so as to remove the aid element than to deal with the consequences of adopting a measure which contains aid.

### (2) Aid not requiring prior approval – (immediate implementation- without Commission approval)

2.1.2. Design or adapt the aid to fit within the **De minimis regulation** ([see Chapter 4](#)). This does not need approval or notification in advance.

2.1.3. Design or adapt the proposed aid to fit one or more of the categories of State aid within the **General Block Exemption Regulation** (GBER; [see Chapter 5](#)). This does not need approval in advance. You must submit information to the Commission about the aid measure within 20 working days of it coming into force.

### (3) Aid requiring prior approval (minimum of 6-18 months from submission of prenotification)

2.1.4. Design or adapt the aid to fit within the terms of **published guidelines, frameworks, notices and communications** which the Commission uses when deciding whether the proposed State aid may be compatible with the Treaty ([Chapter 8](#)).<sup>9</sup> This must be notified in advance to the Commission.

2.1.5. Design the assistance in a way which, although it may not fit within existing approved schemes, Commission Regulations, frameworks or guidelines, may be capable of **individual approval** by the Commission. This requires advance approval from the Commission ([see Chapter 8](#)).

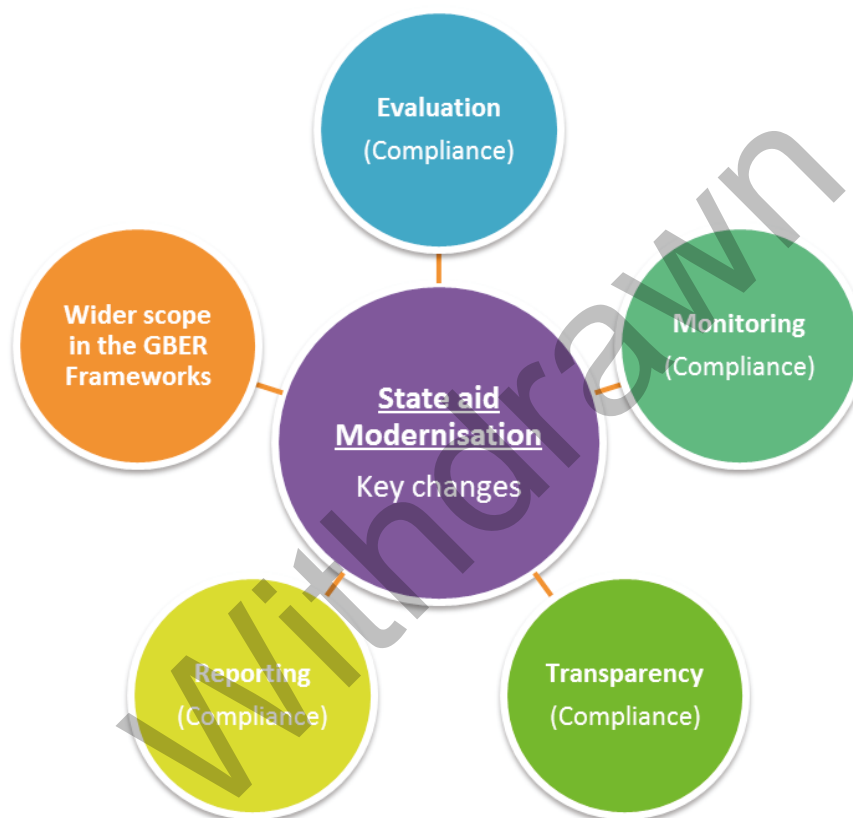
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<sup>9</sup> [http://ec.europa.eu/competition/state\\_aid/legislation/compilation/index\\_en.html](http://ec.europa.eu/competition/state_aid/legislation/compilation/index_en.html)

## Implications of State Aid Modernisation (SAM) 2014

The Commission has recently carried out a modernisation of the State aid regime intended to foster growth, focus enforcement on the cases which have a bigger impact on the market and streamline rules and decision-making<sup>10</sup>. The SAM package expanded the General Block Exemption Regulation to facilitate a more streamlined approach to the grant of certain types of aid, enabling Member States to do more without the need to undergo the approval process whilst increasing Member States' obligations in terms of monitoring, transparency and compliance. The main changes that may have an impact on public authorities are shown in *Figure 3- SAM Key changes*.

**Figure 3- SAM Key changes**



**SAM continues to develop and as a public authority granting aid you are responsible for ensuring you are compliant. Failure to comply with any of the requirements on transparency, evaluation and monitoring can have serious consequences for your aid measure and policy.**

Please see the blue SAM boxes throughout the manual that will highlight how SAM is relevant to that particular topic area and [Chapter 6](#) for a more detailed explanation. **It is essential to read the requirements within the regulations set out by the Commission** and seek advice from the BIS State aid Team on how to manage aspects of SAM.

<sup>10</sup> [http://ec.europa.eu/competition/state\\_aid/modernisation/index\\_en.html](http://ec.europa.eu/competition/state_aid/modernisation/index_en.html)

You should monitor the Commissions website for the most recent changes at:  
[http://ec.europa.eu/competition/state\\_aid/modernisation/index\\_en.html](http://ec.europa.eu/competition/state_aid/modernisation/index_en.html)

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# Chapter 3 – Non-aid options

## Some types of assistance are not State aid

- 3.1 State aid rules apply only to assistance that has all four characteristics set out in Article 107(1). [See chapter 1 paragraph 1.7](#) and [The State aid the basics guide](#)<sup>11</sup>. Policy measures which do not meet any one of these characteristics or tests are not caught by the State aid rules.
- 3.2 The Commission has produced a [draft notice on the notion of aid](#) which provides guidance on when measures are and are not caught by the rules. We currently expect the notice to be finalised later in 2015. We strongly advise you to read relevant parts of the notice when considering providing support on a non-aid basis.
- 3.3 Some examples of assistance that does not meet all four tests and which is not therefore State aid are:
- Aid to bodies which are not involved in any economic activities; for example provision of state education.



**Please note:** that it is the activity that you need to consider and not the entity. Any type of entity can theoretically be caught by the State aid rules even public authorities, voluntary groups and non-profit-making organisations.

- General measures available equally to all undertakings in the same situation in all parts of the Member State, e.g. a tax exemption or credit available to all businesses;
- Pure regulatory measures that do not affect the public budget e.g. relaxation of planning or employment regulations for SMEs
- Goods and services purchased or sold at full market value (this is most effectively demonstrated by an open competitive tender following EU public procurement rules);
- Support for general infrastructure projects which are not commercially exploitable and that do not benefit specific users e.g. a road for broad, general public use;
- Aid to individuals (and which does not advantage or relieve an undertaking of a burden
- Damages that national authorities are ordered to pay by a Court.
- Support to public undertakings that satisfies the market economy operator principle (broadly, support that a private sector investor without a policy objective would provide in like circumstances including certain state loans and guarantees ([see more detail below](#))).

<sup>11</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/261384/bis\\_13-1330\\_state\\_aid\\_the\\_basics.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/261384/bis_13-1330_state_aid_the_basics.pdf)



## State aid can be avoided by using the Market Economy Operator (MEO) principle

- 3.4 If the state is acting in a way that a rational private investor would, for example in providing loans or capital on terms that would be acceptable to a genuine private investor who is motivated by return and not policy objectives, then it is not providing State aid within the meaning of Article 107(1). This is because the beneficiary is not considered to be obtaining an advantage from the State – it is getting funding on the same terms that it could have obtained on the market. Therefore, the second test of aid is not met.
- 3.5 Public Authorities relying on the MEO principle should consider carefully how they will evidence this. The best way for a public body to show that it is meeting the Market Economy Operator test is to invest alongside a private investor on identical terms, sharing the same upside and downside risks and rewards (*pari passu*). If there is no *pari passu* investor, then public authorities should consider what other evidence could be used (see 3.14 below for more details).
- 3.6 The MEO principle (formerly referred to as market economy investor principle or MEIP) may also be relied on when the state is the main shareholder in an undertaking. The key question is:



**Would a private investor, not taking into account policy objectives such as regional development or safeguarding employment but expecting to make an eventual return, invest in this way?**

- 3.7 In relation to State-controlled companies, the Commission does not expect a public funder to act like an investor who is only out to make a quick return but one who has a long-term commitment e.g. the owner of a private factory.
- 3.8 Investment decisions which later turn out to be wrong are not necessarily aid if at the time there were reasonable grounds to believe the investment would come good and that a market investor would have made that investment in those conditions.
- 3.9 However, the Commission is likely to make a distinction between scenarios where a public authority already owns or has a stake in a business, and may therefore need to protect existing investments or be able to benefit from longer term ownership rewards, and scenarios where the State is making a new investment (e.g. investing in a company for the first time or investing in a new venture).<sup>12</sup>
- 3.10 Please refer to section 4.2 of the [draft Commission notice on notion of aid](#) document for information on MEO test.

### Nationalisation

- 3.11 There may be occasions when the State wishes to take an undertaking into State ownership. As long as the state pays a market price, then there should be no State aid barriers to acquiring the undertaking. There is nothing special about

<sup>12</sup> Competition Policy Newsletter – June 2002  
[http://ec.europa.eu/comm/competition/publications/cpn/cpn2002\\_2.pdf](http://ec.europa.eu/comm/competition/publications/cpn/cpn2002_2.pdf)



nationalisation as such. The market price would need to be ascertained through independent valuation.

- 3.12 However, under state ownership, the nationalised entity would remain an undertaking, so that any further money invested into the undertaking would be State aid and would have to be notified to and approved by the Commission unless it could be demonstrated that this was the action of a rational investor thinking of only to maximise their investment and not regional or industrial policy issues. This would need to be supported by documentary evidence. For example, it will be difficult for the “rational investor making a commercial investment” test to be met against a background where the existing shareholder has determined, presumably on rational economic grounds, that the company is not worth further investment.
- 3.13 Moreover, if the nationalisation is made on better than market terms, this could also be aid to the creditors, as it would place creditors in a better position than they would otherwise be.

## Using and evidencing the market economy operator principle

- 3.14 If you are considering relying on the MEO principle:
- You must be able to demonstrate if challenged by the court or Commission that the funding is on genuinely commercial terms. Think carefully about how you would do this.
  - The most robust and strongly recommended way of demonstrating that a state investment is on MEO terms is by ensuring that there is a matching (*pari passu*) investment by an actual commercial entity, provided at the same time or earlier than the state investment and that the risks and rewards are genuinely the identical.
  - Otherwise if there is not a co-investor, proposals that cite MEO as justification should be supported by at least one independent report from a reputable source confirming that the terms and conditions would be acceptable to a market investor. [Section 4.2 of the Commission’s draft notice](#)<sup>13</sup> on the notion of aid provides some further guidance on appropriate benchmarks.
  - To help calculate the equivalent of a “commercial rate of return” in loans and similar instruments the Commission sets a reference rate each month for each Member State<sup>14</sup>. A margin must be added to the reference rate. One should refer to the reference rate communication<sup>15</sup> to help determine the appropriate minimum margin to add to the reference rate to ensure that a loan is given at a commercial rate. The margin will depend on the credit rating of the company and its collateralisation as described in the communication. **The reference rate plus the margins in the reference rate communication should be treated as a minimum rate.**

<sup>13</sup> [http://ec.europa.eu/competition/consultations/2014\\_state\\_aid\\_notion/draft\\_guidance\\_en.pdf](http://ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf)

<sup>14</sup> [http://ec.europa.eu/competition/state\\_aid/legislation/reference\\_rates.html](http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html)  
[http://ec.europa.eu/competition/state\\_aid/legislation/reference\\_rates.html](http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html)

<sup>15</sup> [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008XC0119\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008XC0119(01):EN:NOT) [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008XC0119\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008XC0119(01):EN:NOT)

- Please seek advice from the BIS State aid team who can provide advice on managing any risk involved.

## State guarantees

Legal basis:	<a href="#">Commission Notice on the application of Articles 107 and 108 of the EC Treaty to State aid in the form of guarantees</a> <sup>16</sup> <a href="#">Commission's draft notice on the notion of aid the notion of State aid pursuant to Article 107(1) TFEU</a> <sup>17</sup>
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- 3.15 State guarantees, whether of loans, coverage of losses, or through unlimited liability State holdings in an enterprise, will usually be considered to be State aid under Article 107 (1), whether or not the guarantee is called upon. This is because they remove an element of risk that the enterprise would otherwise have to bear absent the state's involvement. It is not necessary for there to be a formal guarantee to be put into writing. The court and Commission have found that even a statement by a Minister could constitute a guarantee and be caught by the state aid rules. See case T-154/10.
- 3.16 Under the following conditions, the guarantees notice says that state guarantees **may not** constitute State aid.
- 3.17 In the case of an individual guarantee:
- the borrower is not in financial difficulty;
  - the borrower would in principle be able to obtain a loan on market conditions from the financial markets without any intervention by the State;
  - the guarantee is linked to a specific financial transaction, is for a fixed maximum amount, does not cover more than 80 % of the outstanding loan or other financial obligation (except for bonds and similar instruments) and is not open-ended;
  - the market price for the guarantee is paid (which reflects, among other things, the amount and duration of the guarantee, the security given by the borrower, the borrower's financial position, the sector of activity and the prospects, the rates of default, and other economic conditions).
- 3.18 In the case of a guarantee scheme:
- the scheme does not allow guarantees to borrowers in financial difficulty;
  - the borrowers would in principle be able to obtain a loan on market conditions from the financial markets without any intervention by the State;
  - the guarantees are linked to a specific financial transaction, are for a fixed maximum amount, do not cover more than 80% of each outstanding loan or other financial obligation (except for bonds or similar instruments) and are not open-ended;

<sup>16</sup> [http://ec.europa.eu/comm/competition/state\\_aid/legislation/instruments.html](http://ec.europa.eu/comm/competition/state_aid/legislation/instruments.html)

<sup>17</sup> [http://ec.europa.eu/competition/consultations/2014\\_state\\_aid\\_notion/draft\\_guidance\\_en.pdf](http://ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf)

- the terms of the scheme are based on a realistic assessment of the risk so that the premiums paid by the beneficiary enterprises make it, in all probability, self-financing;
- the scheme provides for the terms on which future guarantees are granted and the overall financing of the scheme to be reviewed at least once a year;
- the premiums cover both the normal risks associated with granting the guarantee and the administrative costs of the scheme, including, where the State provides the initial capital for the start-up of the scheme, a normal return on that capital.

3.19 If you are giving a guarantee on a non-aid basis you need to consider carefully how you will meet the condition that “borrowers would in principle be able to obtain a loan on market conditions from the financial markets without any intervention by the State”. A guarantee which would not be available to the borrower from the market in the absence of the state’s involvement is likely to be found to be aid. Guidance on how this might be demonstrated is provided in the draft Commission notice on the notion of aid.

## Sales of land and buildings by public authorities

3.20 The Commission has set out guidelines on procedures for the sale of land by public authorities that automatically preclude the existence of State aid (the Communication on the State aid elements in sales of land by public authorities<sup>18</sup>). If there has been a sufficiently well-publicised, open and unconditional bidding procedure and the best or only offer is accepted, there would be no State aid involved in the transaction. The Communication provides further guidance, in particular on the ability to impose restrictions on use of land and on the options if an open and unconditional bidding procedure is used.

3.21 If land is sold for less than market value, you would then need to find a way of giving the aid in compliance with the State aid rules and may need to notify the Commission. In particular you should consider, use of the regional aid guidelines in assisted areas or the General Block Exemption Regulation or the [de minimis regulation](#).

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<sup>18</sup> [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y0710\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y0710(01):EN:HTML)

# Chapter 4 – De minimis

## Introduction

4.1 The *De minimis* regulation allows Member States to give comparatively small amounts of support up to a certain limit, which may be paid for almost any purpose, as long as it meets all of the conditions set out in the *De minimis* Regulation. Prior notification and approval are not necessary as long as the requirements of the regulation are met.

## *De minimis* aid

**Legal basis** for *De minimis* is the [Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to \*de minimis\* aid](#).

4.2 *De minimis* aid is used to describe small amounts (€200,000 over a 3 year fiscal period) of support which complies with the *de minimis*.

4.3 The European Commission considers that public funding which complies with the *de minimis* regulation has a negligible impact on trade and competition, and does not require notification and approval.

4.4 *De minimis aid* can be given for most purposes, including operating aid, and is not project-related:

- The maximum *De minimis* funding any single recipient can receive is €200,000<sup>19</sup> (cash grant equivalent) over a 3-year fiscal period. You must take steps to ensure the limit is not exceeded and that you can demonstrate this.
- The sterling equivalent is calculated using the [Commission exchange rate](#) (See journal exchange rate) applicable on the written date of offer of the *De minimis* funding.
- The above ceilings apply to the total amount of *De minimis* aid to a single recipient from all sources of *De minimis* aid.
- *De minimis* aid cannot be given towards the same costs that are being supported under another block exemption or notified scheme if it means that the total aid would exceed what is allowed under the block exemption or notified scheme. *De minimis* aid could be given for separate costs however.

4.5 *De minimis* aid cannot be given for:

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<sup>19</sup> €100,000 in the road freight transport sector

- Aid for “export-related activities”, in particular assistance which is linked to exported quantities, assistance to establish or operate a distribution network, and other current expenditure linked to exporting is not permitted, but you can support attendance at trade fairs.
  - aid contingent upon the use of domestic over imported goods
  - Agriculture and fisheries. If you wish to give aid for agricultural activities, separate *De minimis* regulation applies. Please contact [Defra](#) for more information
- 4.6 The full text of the *De minimis* Regulation<sup>20</sup> should be consulted for definitive guidance.

## Using the *De minimis* regulation

- 4.7 Public authorities must understand the regulation and satisfy themselves that they are in compliance.
- 4.8 The key requirements and processes are as follows:
- 4.9 When granting *De minimis* aid you must ensure that the new award does not breach the €200,000 ceiling over a 3-year fiscal period.
- You must ask the undertaking concerned about any aid received during the previous 3 fiscal years and determine how much of this was *De minimis* aid.
  - You must also inform the recipient explicitly that it is *De minimis* aid you are giving them, for their future reference. They should also be told that they must declare this in future if asked.
  - Sample texts for these letters are given at [Annex B](#) of this guide.
- 4.10 The Regulation requires Member States to record information to demonstrate that the Regulation has been complied with.
- Public authorities must keep records of all *De minimis* aid paid for ten years from the last payment.
  - Beneficiaries must keep records *De minimis* aid for 3 years. On written request, Member States must provide the Commission, within 20 working days or within a longer period fixed in the request, with all the information that the Commission considers necessary for assessing whether the conditions of this Regulation have been complied with.
  - For further advice, please read the [De minimis regulation](#) or contact the State aid Team.

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<sup>20</sup> [http://ec.europa.eu/competition/state\\_aid/legislation/de\\_minimis\\_regulation\\_en.pdf](http://ec.europa.eu/competition/state_aid/legislation/de_minimis_regulation_en.pdf)

# Chapter 5 – General Block Exemption Regulation (GBER)

## Introduction

**Legal basis for the General Block Exemption Regulation (GBER) is the [Commission Regulation EU No. 651 / 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty \(General block exemption Regulation\)](#)**

- 5.1 The General Block Exemption Regulation (GBER)<sup>21</sup> covers a range of pre-approved types of State aid that do not require individual approval from the European Commission in advance of being granted.
- 5.2 Aid granted under cover of the Regulation only has to be notified via a simple form within twenty working days of the aid being granted. There is no need to wait for approval.

### State Aid Modernisation (SAM) and GBER

1. The latest version of GBER, which was adopted in 2014 as part of SAM, underwent substantial changes from the previous version. Much more aid can now be given under GBER. New categories of aid can now be given under GBER, existing categories of aid have been expanded, and many upper aid limits have doubled. However, new compliance requirements were also introduced and some existing requirements have changed. Public authorities must ensure that new schemes relying on GBER meet all new GBER requirements.
2. **Transparency-** Member States are now required to **publish details of individual aid awards online**. We will need to comply with this within two years of the entry into force of the GBER i.e, 1/7/2016.
3. New requirement to submit an **evaluation plan** to the Commission for aid schemes with an average annual budget of €150m+ within 20 working days of the implementation of the scheme. Such schemes can only benefit from GBER for 6 months unless the Commission decides upon a longer period. The evaluation should consider the effectiveness of the aid measure in the light of its general and specific objectives and should provide indications on the impact of the scheme on competition and trade.

- 5.3 The Regulation authorises aid in favour of the following activities (see Article 1(1) of the GBER regulation). Those marked in red are new categories of aid which were not

<sup>21</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2014:187:FULL&from=EN>



in the previous GBER and would previously have required individual Commission approval.

- Regional aid;
- aid to SMEs in the form of investment aid, operating aid and SMEs' access to finance;
- aid for environmental protection;
- aid for research & development & innovation;
- training aid;
- recruitment and employment aid for disadvantaged workers and workers with disabilities;
- aid to make good the damage caused by certain natural disasters;
- social aid for transport for residents for remote regions;
- aid for broadband infrastructures;
- aid for culture and heritage conservation;
- aid for sport and multifunctional recreational infrastructures; and
- aid for local infrastructure.

## Giving aid in compliance with GBER

5.4 Those giving the aid are responsible for ensuring compliance with all of the conditions of the GBER, so we strongly recommend that you take the time to read and understand the regulation before using it.

5.5 GBER imposes both “general” conditions of aid which apply to all aid given under GBER (chapters 1,2 and 4 of the regulation) as well as specific requirements for individual categories of aid (in chapter 3 of the regulation).

Please note that these conditions include:

- Adherence to definitions, eligible costs, maximum aid amounts, maximum aid intensities and scope (i.e. sectors or areas that can or cannot be supported).
- Retention and provision of accurate and timely information as required, in particular for the annual report as referred to in Article 11 and monitoring exercises as referred to Article 12 of the GBER regulation.
- The need to demonstrate an incentive effect, that is, a change in behaviour in the beneficiary. See below for more detail.

5.6 The process for giving aid under GBER involves:

- Putting in place processes to ensure compliance with all relevant sections of the regulation, including record keeping.
- Informing the Commission via SANI (software for communicating with the Commission). You will need to contact the State aid Team to register on SANI. Both BIS and UKREP (UK representation to the EU) will need to sign off your notification so please ensure you allow enough time to ensure this all happens in good time.

**Procedure Alert!**

If you think you might be required to submit an **evaluation plan**. Please seek advice from the State aid team on how to do this

- If Aid is over €150 million you must submit an evaluation report from 6 months from entry into force. Please seek advice from the State aid team on how to do this at an early stage.
- You must also ensure continued compliance over the life of the scheme, please bear in mind that sometimes small changes in policy or approach could make a difference in terms of compliance with GBER requirements and that any changes or compliance issues could be picked up in future monitoring exercises. The state aid rules might also change. You need to put in place processes to monitor and manage state aid compliance issues.

5.7 Measures that comply with all relevant conditions and criteria as set within the GBER Regulation will benefit from an exemption to the notification requirement. Aid givers are therefore free to implement them without Commission approval. However, Aid givers are responsible for ensuring that their measures meet all of the GBER conditions over the lifetime of the scheme.

5.8 If you are unsure how a condition in the GBER should be interpreted please seek advice from the state aid team. Some guidance on specific provisions of GBER follows.

**Key GBER Requirements**

5.9 The Regulation applies to “transparent” forms of aid (Article 5): i.e. grants and interest rate subsidies, loans where gross grant equivalent takes account of the reference rate, some guarantees, fiscal measures (with a cap) and some types of repayable advances.

5.10 Aid can only be allowed under GBER if it has an incentive effect (Article 6). The GBER provides different criteria for the verification of the incentive effect with ranging complexity:

- for certain types of measures, incentive effect is presumed
- for SMEs, the incentive effect is present if the application for aid (containing certain required information) was submitted prior to the start of the project
- for ad hoc aid to large enterprises, in addition to the above, the Member State must seek additional evidence to verify incentive effect see *Article 6* in the GBER Regulation<sup>22</sup>.

**Procedure Alert!**

**GBER Aid can't be given to companies in difficulty**

<sup>22</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2014:187:FULL&from=EN>



5.11 The GBER sets individual aid ceilings for each category of measure. See Article 4. It also sets maximum aid intensities (which are the amount of aid that can be given as a proportion of eligible costs) for each category which are generally set out in the individual articles for each category of aid in chapter 3 of GBER. If either is exceeded, the measure cannot be given under the GBER.

### Giving multiple aid awards to the same project (Cumulation – Article 8)

- Cumulation of aid for different measures of the GBER is possible as long as they concern separate identifiable eligible costs. Cumulation is not allowed for partly or fully overlapping costs if such cumulation would lead to exceeding the highest allowable aid intensity or aid amount applicable under GBER.
- In determining whether the notification thresholds and the maximum aid intensities are respected total amount of State aid for the aided activity or project or undertaking must be taken into account<sup>23</sup>. That is, the total aid given in support of the same costs should not exceed the maximum which would be permitted under GBER, even when this is provided under different schemes or from different sources.
- Aid with identifiable eligible costs may however be cumulated with: (a) any other State aid, with different identifiable eligible costs.
- Aid without identifiable eligible costs exempted under Articles 21, 22 and 23 of GBER may be cumulated with any other State aid with identifiable eligible costs. It may also be cumulated with any other State aid without identifiable eligible costs, up to the highest relevant total financing threshold fixed in the specific circumstances of each case by this or another block exemption regulation or decision adopted by the Commission.
- State aid exempted under GBER **shall not be cumulated with any de minimis aid in respect of the same eligible costs** if such cumulation would result in an aid intensity exceeding those allowed under GBER. However aid in favour of workers with disabilities, as provided for in Articles 33 and 34 may be cumulated with other aid exempted under GBER Regulation in relation to the same eligible costs above the highest applicable threshold under GBER Regulation, provided that such cumulation does not result in an aid intensity exceeding 100 % of the relevant costs over any period for which the workers concerned are employed.<sup>24</sup>

### Exceptions

5.12 The GBER applies to nearly all sectors of the economy, **except for**:

- export-related activities
- aid contingent upon the use of domestic over imported goods

<sup>23</sup> Article 8; <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2014:187:FULL&from=EN>

<sup>24</sup> Article 8; <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2014:187:FULL&from=EN>

Special rules apply to:

- fisheries and aquaculture
- Agriculture
- Companies in difficulty
- Companies undergoing a State aid recovery order

## GBER information and reporting requirements

5.13 Funders are required to send the Commission a summary information sheet about the aid measure via the State aid Notification Interactive (SANI) system within 20 working days following implementation of the measure. The information required is set out in Annex II of the regulation.

5.14 It is important that the GBER information and reporting requirements are strictly adhered to:

- The Commission actively scrutinises and follows up annual reports, notification and other information to ensure the information in them is correct.
- The Commission also conducts ad hoc enquiries into new and existing aid schemes, in particular where operated under block exemption provisions, where the responsible authorities will be required to produce evidence within fairly strict timescales that schemes are being run in accordance with State aid terms.
- It is therefore important that staff in funding bodies are equipped to work effectively within the State aid rules at every stage of design, implementation and reporting.
- Proper records must be kept to facilitate smooth annual reporting process and to respond to enquiries by the Commission within 20 working days. Such records should be kept for 10 years from the date on which the aid was granted. There should also be a single point of contact in the funding body for a particular aid scheme.
- The responsible contact person should also be responsible for ensuring on going compliance with GBER as scheme and policy develops.

Funders will need to provide a web site link to the scheme:

- This should provide full details of the aid measure (see Article 11(a)) including the criteria for qualifying for aid, eligible costs, scope etc.
- The Commission frequently checks funders' websites.

- To be registered on SANI (State Aid Notification Interactive the IT software used to notify State aid to the European Commission). Please contact the State Aid Team on how to do this.

## GBER Categories

5.15 This part of the chapter is intended to provide an overview of possible aid measures **and MUST be read in conjunction with the common and specific provisions in the regulation**. Please note in particular that the common provisions, apply to all aid given under the GBER and also, set out the administrative requirements of using the GBER.



**In particular, you should note that these instruments are subject to regular review by the Commission and the provisions may change accordingly.**

**Changes you make to your aid measure may result in it no longer complying with GBER requirements and this may result in illegal aid.**

Withdrawn

## Section 1: Regional Aid 2014 – 2020

### Figure 1- Explanation of Terms used:

**Eligible costs:** Aid for initial investment can be calculated as a percentage of the investment cost in tangible or intangible assets or as a percentage of the estimated wage-cost of the jobs linked to the initial investment.

**Investment:** tangible investment (land, buildings, plant/machinery) and limited types of intangible investment (such as expenditure entailed by technology transfer).

**Large Investment Project:** Project with eligible costs above €50million.

**New establishment:** A new place of business which is intended to be stable, regular and to continue for an indefinite period. Usually this would require the place of business to be fully functional, autonomous and self-standing, but there may be sharing of back office functions (such as IT and HR).

**New activity:** An activity which does not fall under the same 4-digit NACE or SIC code as activities previously performed at the establishment.

**Operating aid:** Aid aimed at reducing a firm's current expenditure (eg. salary costs, transport costs, rents).

Pre-defined 'c' regions are those which were 'a' regions in 2011-2013 or are sparsely populated

**Single Investment project:** Any initial investment / initial investment in favour of new economic activities started by the same beneficiary (at group level) in a period of 3 years of the start of another aided project in the same NUTS 3 area.

**Wage-cost:** Gross wage-cost, calculated over a period of two years multiplied by the number of jobs created (net job creation in the establishment concerned compared with the average over the previous 12 months).

This section is an overview of some of the key aspects of the GBER regional aid rules. For further information, please consult the GBER regulation and the regional aid guidelines<sup>25</sup> which can be found on the Commission's website.

Regional aid is to promote the development of the less-favoured regions mainly by supporting initial investment, or in exceptional cases, by providing operating aid.

There are two categories of eligible regions:

<sup>25</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:209:0001:0045:EN:PDF>

Article 107(3)(a) regions<sup>26</sup>: These are regions, designated in a regional aid map, where the standard of living is abnormally low or where there is serious underemployment (NUTS II regions with a GDP / cap lower than 75% of the EU average). In the UK this is Cornwall, West Wales and the Valleys, and parts of Tyneside.

Article 107(3)(c) areas: These are regions, designated in a regional aid map, defined on the basis of national indicators proposed by the Member States.

The assisted area map can be found here: [www.ukassistedareasmap.com](http://www.ukassistedareasmap.com).

Regional aid cannot be given under GBER to:

- Steel sector
- Coal sector
- Energy generation, distribution, and infrastructure<sup>27</sup>
- Synthetic fibres sector
- Shipbuilding
- Transport sector and related infrastructure

Regional aid schemes cannot be targeted at a limited number of specific sectors of economic activity, except where there are targeted at broadband infrastructure, tourism or the processing and marketing of agricultural products.

### Aid which must be notified on an individual project basis

Regional Aid **must be notified** to the Commission and approved by the Commission as compatible prior to payment if:

<sup>26</sup> Article 107(3)(a) and (c) of the Treaty on the Functioning of the European Union allow the possibility of State aid for tackling regional problems. Article 107(3)(a) allows aid for regions disadvantaged compared with the *EU* average. Article 107(3)(c) allows aid for regions disadvantaged compared with the *national* average.

<sup>27</sup> Energy generation and distribution means the following activities and NACE codes:

- 35 - Electricity, gas, steam and air conditioning supply
- 35.1 - Electric power generation, transmission and distribution
- 35.1.1 - Production of electricity
- 35.1.2 - Transmission of electricity
- 35.1.3 - Distribution of electricity
- 35.1.4 - Trade of electricity
- 35.2 - Manufacture of gas; distribution of gaseous fuels through mains
- 35.2.1 - Manufacture of gas
- 35.2.2 - Distribution of gaseous fuels through mains
- 35.2.3 - Trade of gas through mains
- 35.3 - Steam and air conditioning supply
- 35.3.0 - Steam and air conditioning supply

- ✓ The aid amount is higher than €7.5million in a 10% 107(3)(c) area, €11.25m in a 15% 107(3)(c) area or €18.75m in a 107(3)(a) area.
- ✓ The undertaking receiving the aid has closed down the same or similar activity in the EEA in the last two years prior to the application or has plans to do so in the two years following completion of the project.
- ✓ The aid is granted to a large undertaking in a 'c' area to subsidise their diversification into a new product or change in process within the same NACE / SIC code sector which they are currently active in.

Aid which is notified will be subject to a detailed assessment and the amount of aid will be capped at the level of net extra costs (compared with the costs that would have been incurred if no aid had been given).

### **Aid that can be block exempted or awarded as part of a notified scheme**

#### Aid for initial investment

Investment is capital in investments by companies which support new investment.

For SMEs in all assisted areas and non-SMEs in [107\(3\)\(a\)](#) areas, regional aid given for 'Initial investment' is block exempted.

Initial investment means capital spending relating to:

- the setting up of a new establishment;
- the extension of an existing establishment; or
- the starting up of an activity involving the production of products not previously produced in the establishment; or
- a fundamental change in the production process of an existing establishment; or
- Acquisition of assets belonging to an establishment which closed or would have closed had it not have been purchased.

#### **Aid for initial investment in favour of new economic activities**

For non-SMEs in 107(3)(c) areas, the block exemption for regional aid applies only to 'Initial investment in favour of new economic activities'.

This is Investment in capital costs relating to:

- The setting up of a new establishment; or
- In an existing establishment a change to a new activity which the establishment has not previously carried out; or

- Acquisition of assets belonging to an establishment which closed or would have closed had it not have been purchased, provided that the assets are used for a new activity.

### Rules for investment aid in all assisted areas:

- The investment / jobs created by the aid must be maintained in the region concerned for 5 years (3 years for SMEs) after the completion of the investment project.
- At least 25% of the financial contribution must come from sources free from public subsidy.
- The Company needs to provide written confirmation that they (at group level) have not made closures in that sector in the past two years and do not have concrete plans for closures within two years following the completion of the investment project.

### Operating aid

**Operating Aid** is simply the Aid given to an organisation to assist it to continue operating. Operating aid **is usually illegal**.

Operating aid may only be granted without notification in sparsely populated areas (as accepted by the Commission on regional aid maps) to compensate for additional transportation costs of goods which have been produced in the area:

- The beneficiaries must have their production activities in the area
- The aid must be quantified in advance on the basis of a fixed sum or per ton/kilometre or other relevant unit
- The costs are calculated for the journey from point of origin to point of destination within the UK using the cheapest means of transport possible, taking into account environmental costs.
- 100% of the eligible additional costs may be aided
- Regional operating aid can't be given for:
  - finance and insurance activities
  - transporting agricultural and fisheries
  - energy supply
  - mining and quarrying

### Aid amount

**Maximum Regional Aid Intensities** The maximum percentage of the eligible costs which can be paid in a given area under the regional aid rules is known as the aid intensity.



Article	Large Enterprise	Medium enterprise	Small enterprise
<b>Article 107(3)(a) region &lt; 75% GDP</b>	25%	35%	45%
<b>Article 107(3)(c) region (pre- defined)</b>	15%	25%	35%
<b>Article 107(3)(c) region (not pre- defined)</b>	10%	20%	30%

Large investment projects are subject to a sliding scale for maximum aid intensity. The maximum aid amount for a large investment project should be adjusted according to this formula:

$$R \times (50 + 0.5 \times B + 0.34 \times C)^{28}$$

Where R is the maximum aid intensity for the area (excluding any increase in aid intensity available for SMEs); B is the part of the eligible costs between €50m and €100m and C is the part of the eligible costs exceeding €100m.

Large Investment projects are not eligible for increased aid intensity for SMEs.

## Cumulation

Aid intensity ceilings specified in the tables above apply to total aid given.

- Regional aid to an undertaking (at group level) within a NUTS 3 area is added together over a three year period.
- If the cumulated amount of eligible costs is more than €100m, any further aid will be notifiable. Eligible costs over €50m will be subject to tapering.
- This also applies where assistance is granted under several regional aid schemes and whether the aid comes from local, regional, national or Community sources (except Community sources not directed by UK authorities).
- Where expenditure eligible for regional aid is eligible for aid for other purposes (e.g. R&D), it will be subject to the most favourable ceiling under the schemes in question.

<sup>28</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XC0723%2803%29&from=EN>



## Section 2: Aid to SMEs

### Explanation of terms used:

**'employment directly created by an investment project'**- means employment concerning the activity to which the investment relates, including employment created following an increase in the utilisation rate of the capacity created by the investment.

**'organisational cooperation'**- means the development of joint business strategies or management structures, the provision of common services or services to facilitate cooperation, coordinated activities such as research or marketing, the support of networks and clusters, the improvement of accessibility and communication, the use of joint instruments to encourage entrepreneurship and trade with SMEs.

**'advisory services linked to cooperation'**- means consulting, assistance and training for the exchange of knowledge and experiences and for improvement of cooperation.

**'support services linked to cooperation'**- means the provision of office space, websites, data banks, libraries, market research, handbooks, working and model documents.

### Overview:

The Commission recognises the key role that SMEs play in the economy, but that they suffer from a number of market failures. SMEs often have difficulties in obtaining capital or loans, given the risk averse nature of certain financial markets and the limited collateral that they may be able to offer. Their limited resources may also restrict their access to information, notably regarding new technology and potential markets.

To facilitate the development of the economic activities of SMEs, the Regulation therefore exempts certain categories of aid when they are granted in favour of SMEs. These include SME investment aid and SME participation in fairs.

Aid that can be block exempted:

- **[Article 17](#) – Investment aid to SMEs - up to €7.5m** aid(per undertaking per project) can be provided for up to 20% for small enterprises and 10% for medium-sized enterprises of the eligible costs of investments in tangible and intangible assets and the estimated wage costs of employment directly caused by the investment over two years.
- **[Article 18](#) – Aid for consultancy in favour of SMEs - up to €2m** aid (per undertaking per project)can be provided for up to 50% for the costs of consultancy services provided by external consultants.
- **[Article 19](#) – Aid to SMEs for participation in fairs - up to €2m** of aid (per undertaking per year) can be provided for up to 50% of the costs of renting/setting-up and running a stand at a fair or exhibition.

- **Article 20 - Aid for co-operation costs incurred by SMEs in European Territorial Cooperation projects - up to €2m per undertaking per project.** Aid can be provided for up to 50% of the costs for organisational cooperation including the cost of staff and offices to the extent that it is linked to the cooperation project; and costs of advisory and support services linked to cooperation and delivered by external consultants and service providers. Also, it can be provided for travel expenses, costs of equipment and investment expenditure directly related to the project.

Withdrawn

## Section 3: Aid for access to finance for SMEs

### Explanation of terms used:

**'Loans'** means an agreement which obliges the lender to make available to the borrower an agreed amount of money for an agreed period of time and under which the borrower is obliged to repay the amount within the agreed period. It may take the form of a loan, or another funding instrument, including a lease, which provides the lender with a predominant component of minimum yield. The refinancing of existing loans shall not be an eligible loan.<sup>29</sup>

**'guarantees'** a written commitment to assume responsibility for all or part of a third party's newly originated loan transactions such as debt or lease instruments, as well as quasi-equity instruments<sup>30</sup>

**'risk finance investment'** means equity and quasi-equity investments, loans including leases, guarantees, or a mix thereof to eligible undertakings for the purposes of making new investments.

**'equity investment'** means the provision of capital to an undertaking, invested directly or indirectly in return for the ownership of a corresponding share of that undertaking.

**'first commercial sale'** means the first sale by a company on a product or service market, excluding limited sales to test the market.

**'follow-on investment'** means additional risk finance investment in a company subsequent to one or more previous risk finance investment rounds.

**'quasi-equity investment'** means a type of financing that ranks between equity and debt, having a higher risk than senior debt and a lower risk than common equity and whose return for the holder is predominantly based on the profits or losses of the underlying target undertaking and which are unsecured in the event of default. Quasi-equity investments can be structured as debt, unsecured and subordinated, including mezzanine debt, and in some cases convertible into equity, or as preferred equity.

**'innovative enterprise'** means an enterprise:

(a) that can demonstrate, by means of an evaluation carried out by an external expert that it will in the foreseeable future develop products, services or processes which are new or substantially improved compared to the state of the art in its industry, and which carry a risk of technological or industrial failure, **or**

(b) the research and development costs of which represent at least 10% of its total operating costs in at least one of the three years preceding the granting of the aid or, in the

<sup>29</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0651&from=EN>

<sup>30</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0651&from=EN>

case of a start-up enterprise without any financial history, in the audit of its current fiscal period, as certified by an external auditor

### **Overview:**

The new risk finance rules are aimed at enhancing the incentives of private sector investors - including institutional ones – to invest and increase their funding activities in the area of SME financing.

The finance gap (which is the difference between a country's need for foreign exchange to finance its debts and income and the country's incomes from overseas), also provides the rationale for aid for start-ups.

### **Article 21 – Risk finance aid**

Risk finance investment schemes may be block exempted if they adhere to a number of criteria:

The total amount of risk finance aid that SMEs may take, in the form of equity, quasi-equity, loans guarantees, or a mix thereof, shall not exceed €15m per undertaking.

To be eligible SME's must, at the time of the first risk capital investment fulfil at least **one** of the following conditions:

- (a) they have not been operating in any market;
- (b) they have been operating in any market for less than 7 years following their first commercial sale;
- (c) they require an initial risk finance investment which, based on a business plan prepared in view of entering a new product or geographical market, is higher than 50% of their average annual turnover in the preceding 5 years.

The level of required private investment depends on the stage of growth of the

### **SME:**

- (a) 10% of the risk finance provided to the eligible undertakings prior to their first commercial sale on any market;
- (b) 40% of the risk finance provided to the eligible undertakings where they have been operating in any market for less than 7 years following their first commercial sale;
- (c) 60% of the risk finance for investment provided to undertaking requiring an initial risk finance investment which, based on a business plan prepared in view of entering a new product or geographical market, is higher than 50% of their average annual turnover in the preceding 5 years.

60% private investment is also required for follow-on investments in eligible undertakings after the 7-year period mentioned in paragraph (b).

Financial intermediaries should be managed on a commercial basis. This requirement is considered to be fulfilled where the financial intermediary and the fund manager, fulfil the following conditions:

- (a) they are obliged by law or contract to act with the diligence of a professional manager in good faith and avoiding conflicts of interest; best practices and regulatory supervision shall apply;
- (b) their remuneration is at market rate. This requirement is presumed to be met where the manager or the financial intermediary is selected through an open, transparent and non-discriminatory selection call, based on objective criteria linked to experience, expertise and operational and financial capacity;
- (c) their remuneration is linked to performance, or they share part of the investment risks by co-investing own resources so as to ensure that their interests are permanently aligned with the interests of the public investor.
- (d) they shall set out an investment strategy, criteria and the proposed timing of investments;
- (e) investors shall be allowed to be represented in the governance bodies of the investment fund, such as the supervisory board or the advisory committee.

Withdrawn

## **Article 22 – Aid for start-ups**

Eligible undertakings shall be unlisted small enterprises up to five years following their registration, which have not yet distributed profits and have not been formed through a merger. For eligible undertakings that are not subject to registration the five years eligibility period may be considered to start from the moment when the enterprise either starts its economic activity or is liable to tax for its economic activity.

Start-up aid may take the form of:

(a) loans with interest rates which do not conform with market conditions, with a duration of 10 years and up to a maximum of €1m, or €1.5m for undertakings established in Article 107(3)(c) assisted areas, or €2m for undertakings established in Article 107(3)(a) assisted areas. For loans with a duration comprised between 5 and 10 years the maximum amounts may be adjusted by multiplying the amounts above by the ratio between 10 years and the actual duration of the loan. For loans with durations of less than 5 years, the maximum amount shall be the same as for loans lasting 5 years;

(b) guarantees with premiums which do not conform with market conditions, with a duration of 10 years and up to maximum €1.5m of amount guaranteed, or €2.25m for undertakings established in Article 107(3)(c) assisted areas, or €3m for undertakings established in Article 107(3)(a) assisted areas. For guarantees with a duration comprised between 5 and 10 years the maximum amount guaranteed amounts may be adjusted by multiplying the amounts above by the ratio between 10 years and the actual duration of the guarantee. For guarantees with durations of less than 5 years, the maximum amount guaranteed shall be the same as for guarantees with lasting 5 years. The guarantee shall not exceed 80% of the underlying loan.

(c) grants, including equity or quasi equity investment, interests rate and guarantee premium reductions up to €0.4m gross grant equivalent or €0.6 million for undertakings established in Article 107(3)(c) assisted areas, or €0.8m for undertakings established in Article 107(3)(a) assisted areas.

For small and innovative undertakings these aid amounts can be doubled.

## Section 4: Aid for research, development and innovation

### Explanation of terms used

**R&D project:** defined as an operation that includes activities spanning over one or several categories of R&D and that is intended to accomplish an indivisible task of a precise economic, scientific or technical nature with clearly defined goals. Projects which do not have independent probabilities of technological success are considered as a single project.

**Fundamental research:** defined as “experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundations of phenomena and observable facts, without any direct practical application or use in view”.

**Industrial research:** defined as “planned research or critical investigation aimed at the acquisition of new knowledge and skills for developing new products, processes or services or for bringing about a significant improvement in existing products, processes or services” .

**Experimental development:** pre-competitive development category defined as “the acquiring, combining, shaping and using of existing scientific technological business and other relevant knowledge and skills for the purposes of producing plans and arrangements or designs for new, altered or improved products, processes or services”. This category does not cover routine or periodic changes to produces and services.

**Feasibility studies:** evaluation and analysis of the potential of a project to support decision making.

**Repayable advance:** Grants, expressed as a percentage of the eligible costs, which will be repaid plus interest (at least equal to the applicable discount rate) in the event the project has a successful outcome (as defined on the basis of a reasonable and prudent hypothesis).

**Research infrastructure:** facilities, resources and related services that are used by the scientific community to conduct research in their respective fields and covers scientific equipment or sets of instruments, knowledge based resources such as collections, archives or structured scientific information, enabling information and communication technology-based infrastructures such as grid, computing, software and communication, or any other entity or a unique nature essential to conduct research. Such infrastructures may be ‘single-sited’ or ‘distributed’.

**Innovation clusters:** These are defined as groupings of universities and other research organisations and businesses including innovative start-ups, SMEs and large businesses, which operate in a particular area and promote knowledge transfer by networking, sharing facilities and exchanging expertise.



Aid for Research, Development and Innovation is aimed at encouraging business research and innovation projects, high-tech start-up companies, and research infrastructure and services.

### **R&D and Innovation support that is not considered to constitute State aid**

Public funding of university and other non-profit research organisations' core teaching, research, and result dissemination activities, including provision of infrastructure for core activities, is not State aid. This still applies where organisations also provide economic services such as commercial research and consultancy, as long as the economic services are: necessary to or intrinsically linked to main non-economic activities; use the same inputs (material, equipment, labour & fixed capital) and do not exceed 20% of the annual capacity.

Public funding of university/other non-profit research organisations' licensing and spin-off creation (up to the point they are spun out) is not considered State aid where these activities are in-house and income generated is reinvested in the organisations' core public activities.

Where a University/non-profit research organisation effectively collaborates in business research projects, this will not constitute State aid provided the University/non-profit research organisation is paid market rates by business partners for its share of the project work or results, or is given on-going ownership of the results generated by its share of the work. Where these conditions are not met, the organisation's contribution to the project will constitute State aid (see below for terms on which State aid for projects can be approved).

Where public bodies buy or commission research, as opposed to subsidising businesses to carry out research projects (see below); provided the contract is at market rates, in particular where there has been a tender procedure in compliance with the EU procurement directives, or the R&D&I framework, there should be no State aid

Where universities/research organisations or other not for profit intermediaries provide publicly funded services to businesses (for example, contract research, incubator services to SMEs or open access research facilities), they can be regarded as a channel for State aid rather than a recipient of it themselves as long as they can show that they are not deriving an undue advantage as intermediaries. Any aid to end user businesses must comply with normal State aid rules.

It is recommended that you consult the R&D&I framework before relying on any of these exemptions.

### **Aid that can be block exempted or awarded as part of a notified scheme**

#### **Aid for R&D projects**

When giving support for R&D projects, the level of support available depends on the type of research or development being carried out.



		Level of support available (percentage of eligible costs)		
		Notification threshold	Small enterprise	Medium enterprise
Fundamental research	€40m	100%	100%	100%
Industrial research	€20m	70%	60%	50%
Industrial research projects involving collaborations* or where the results will be disseminated	€20m	80%	75%	65%
Experimental development	€15m	45%	35%	25%
Experimental development projects involving collaborations*	€15m	60%	50%	40%
Feasibility studies	7.5m	70%	60%	50%

\* collaborations between businesses and research organisations where the research organisation bears at least 10% of the costs & have the right to publish their own research, or business to business collaborations which involve more than one member state of the EU/ EEA or involve at least one SME, provided that no one business partner carries more than 70% of the project costs.

For EURIKA projects, the notification threshold is double those listed above. Where aid is given in the form a repayable advance, aid intensity ceilings are increased by 10% and the notification threshold is increased by 50%. For EURIKA projects given as repayable advances the notification threshold is therefore triple the amounts listed above.

#### **Article 26- Investment aid for research infrastructures**

4.3 Support given for the construction or upgrade of research infrastructures that perform economic activities is considered state aid and is limited to 50% of the investment costs. Where an infrastructure carries out both economic and non-economic activities, support for the non-economic part is not considered state aid and can be given up to 100% of eligible costs (investment costs in tangible and intangible assets) but support for the economic part is considered state aid and cannot exceed 50%. The financing, costs and revenues of each type of activity must be accounted for separately.

4.4 For example, a research infrastructure that is predominately non-economic but is used for contract research (an economic activity) 30% of the time and costs £10m can receive £8.5m public funding towards its construction: 100% for the 70% non-economic portion (£7m) and 50% for the 30% economic (£1.5m).

4.5 Infrastructure supported in this way must be open to several users on a transparent and non-discriminatory basis. Users must pay a market rate for using the facility. Businesses which have contributed at least 10% to the investment costs can have preferential access proportionate to their contribution. The conditions of this access must be made publicly available.

4.6 Notification threshold for this aid type is set at €20m per infrastructure.

#### **Article 27- Aid for innovation clusters:**

4.7 This category allows the organisation responsible for operating a cluster to be granted investment aid for the construction and upgrade of the innovation cluster. Up to 50% of the eligible costs (investment costs in tangible and intangible assets) can be supported. For facilities in assisted areas (see regional aid) an additional 5% support can be given (15% in Cornwall, West Wales & the Valleys).

4.8 The premises, facilities and activities must be open to several users on a transparent and non-discriminatory basis. Fees charged must be at market rate or reflect costs. Businesses which have contributed at least 10% of the investment costs may be granted preferential access. Such access must be proportional to their contribution and the conditions made publicly available.

4.9 Operating aid may be given for up to 10 years to cover the personnel and administrative costs relating to the start-up costs for collaboration, information sharing and business support services; marketing; and management of the clusters open access facilities.

4.10 The notification threshold for support is €7.5m per cluster, to include both investment and operating aid.

#### **Article 28- Innovation aid for SMEs:**

4.11 This allows a variety of different types of support for SMEs seeking to innovate. Up to 50% of the eligible costs can be met, with a notification threshold of €5m per SME per project.

4.12 The eligible costs are:

- Costs of obtaining, validating and defending patents and other intangible assets;
- Secondment of highly qualified personnel<sup>31</sup> from a research organisation or large enterprise, working on research, development and innovation activities in a newly created function within the beneficiary, not replacing existing personnel;

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<sup>31</sup> degree educated staff with at least 5 years relevant professional experience, which may include doctoral training

- Costs of innovation advisory and support services including consultancy, and training in the areas of knowledge transfer, acquisition, protection and exploitation of intangible assets, use of standards and regulations embedding them and the provision of office space, data banks, libraries, market research, laboratories', quality labelling, testing and certification for the purpose of developing more effective products, processes or services

4.13 Where the costs of innovation advisory and support services do not exceed €200,000 over three years, the maximum support rate for those services only can be increased to 100%.

#### **Article 29- Aid for process and organisational innovation**

4.14 This allows support for changes to new organisational methods of business practices or the implementation of new or significantly improved production or delivery methods. The changes it supports must not be routine or reactive changes, for example as a result of changes ceasing to use a process, simple capital replacement or extension, changes resulting purely from changes in factor prices, customisation, localisation, regular, seasonal and other cyclical changes and trading of new or significantly improved products. Large companies are only eligible for grants as part of collaborative projects with SMEs; the SMEs must bear at least 30% of project costs.

4.15 Aid intensities are 50% of eligible costs for SMEs and 15% for large enterprises in collaboration with SMEs. Eligible costs are the same as for R&D project aid. Notification threshold is €7.5m per recipient per project.

## Section 5: Training Aid

### Overview

The promotion of training constitutes a central objective of the economic and social policies of the Union and its Member States.

Training usually generates benefits for society, increasing the pool of skilled workers and improving the competitiveness of industry. Aid to promote training is therefore exempted from the notification requirement under certain conditions. In light of the particular handicaps that SMEs face and the higher relative costs they must bear when they invest in training, the intensities of aid exempted by the GBER are increased for SMEs. Additionally, the intensities of aid exempted are further increased if the training is given to disadvantaged workers or to workers with disabilities.

The GBER covers aid up to €2 million per training project providing certain conditions are met. Any individual aid with a [grant equivalent](#) exceeding €2 million per training project must be notified to the Commission for prior approval. Aid cannot be granted for training which is carried out to comply with national mandatory standards on training.

### Eligible Costs and Aid Intensities

The eligible costs shall be the following:

(a) trainers' personnel costs, for the hours during which the trainers participate in the training;

(b) trainers' and trainees' operating costs directly relating to the training project such as travel expenses, materials and supplies directly related to the project, depreciation of tools and equipment, to the extent that they are used exclusively for the training project. Accommodation costs are excluded except for the minimum necessary accommodation costs for trainees who are workers with disabilities;

(c) costs of advisory services linked to the training project;

(d) trainees' personnel costs and general indirect costs (administrative costs, rent, overheads) for the hours during which the trainees participate in the training.

4. The aid intensity must not exceed 50% of the eligible costs. It may be increased, up to a maximum aid intensity of 70% of the eligible costs, as follows:

(a) by 10 percentage points if the training is given to workers with disabilities or disadvantaged workers;

(b) by 10 percentage points if the aid is granted to medium-sized enterprises and by 20 percentage points if the aid is granted to small enterprises;

Withdrawn

## Section 6: Environmental Aid

### Explanation of terms used:

**Investment aid:** provided to offset the additional fixed investment costs of a more environmentally friendly project

**Operating aid:** provided to offset the on-going operating costs and incentivise continued operation of an environmental project

### Overview

The Commission notes that investments to increase levels of environmental protection are essential to meeting EU targets and sustainable development. However, these may be hampered by market failures. In particular, such investments can be more risky and costly and the additional costs incurred in improving levels of environmental protection may not always result in corresponding benefits for the investor.

The Commission considers that regulation should usually be used to overcome market failure; however, State aid may be justified to deliver higher levels of environmental protection than those required under EU law. In principle, State aid may not be used to support investments which are required to comply with EU law however it can be used to enable firms to meet national requirements as long as these provide a higher level of environmental protection than EU law.

In general, environmental aid is intended to restore a level playing field. Therefore, it is usually the case that only those extra costs associated with increased levels of environmental protection are eligible costs. Where these extra costs are not obvious, they may be calculated by subtracting the cost of a technically equivalent counterfactual investment (which meets minimum EU environmental standards) from the cost of the greener investment. For example, the eligible costs of an electric vehicle may be found by subtracting the cost of an equivalent ICE vehicle from the cost of the electric vehicle

Environmental aid may only be used to support investments which directly improve the environmental performance of the beneficiary; it may not be used for the design and manufacture of green products. For example, it may be used for the purchase of a fleet of electric vehicles but it cannot be used to support the manufacture of those vehicles. Other forms of aid, such as training aid or R&D&I aid might be used instead in such cases.

### Aid that can be block exempted:

#### **Article 36 – Investment aid to go beyond EU standards for environmental protection**

*Article 36* allows investment aid for any project which increases levels of environmental protection beyond minimum EU standards (including those which have been adopted but are not yet in force) **and** which does not fall within one of the other categories of environmental aid. Aid for the purchase of more

environmentally friendly transport vehicles which comply with future EU standards which have been adopted but are not yet in force is permitted. Otherwise aid to help firms comply with future EU standards early can be provided under Article 37.

Eligible costs are the extra costs. The maximum aid intensity is 40%. This aid intensity can be increased by 10% for medium companies and 20% for small companies; and by 15% for investments in [107\(3\)\(a\)](#) areas and 5% for investments in [107\(3\)\(c\)](#) areas.

### **Article 37 – Investment aid for early adaptation to EU standards for environmental protection**

Investment aid can be used to support undertakings who comply with future EU environmental standards early.

The eligible costs are the extra costs. The maximum aid intensity is 10% if the project is completed and implemented more than three years before the new EU environmental standard comes into force. The aid intensity is 5% if the project is completed and implemented between 1 and 3 years before the entry into force of the new EU environmental standard. This aid intensity can be increased by 5% for medium companies and 10% for small companies; and by 15% for investments in [107\(3\)\(a\)](#) areas and 5% for investments in [107\(3\)\(c\)](#) areas.

### **Article 38 - Investment aid for energy efficiency**

Up to €15M per undertaking may be given to projects which enabled undertakings to achieve energy efficiency, as long as they are not to comply with Union standards already adopted. The eligible costs are the extra costs required to achieve the higher level of energy efficiency and the maximum aid intensity is 30%. This aid intensity can be increased by 10% for medium companies and 20% for small companies; and by 15% for investments in [107\(3\)\(a\)](#) areas and 5% for investments in [107\(3\)\(c\)](#) areas.

### **Article 39 - Investment aid for energy efficiency in buildings**

This article allows aid measures which are aimed at providing loans and guarantees in support of energy efficiency projects in buildings, similar to the UK's Green Deal scheme. The aid is provided to in the form of an endowment, equity, guarantee or loan to a financial intermediary or fund who in turn passes this on in full in form of loans or guarantees to householders and businesses with energy efficiency projects. The value of loans to the end beneficiary should not exceed €10M and guarantees must not underlie more than 80% of the finance involved. Beneficiaries should not repay less than the nominal value of the loan.

There are a number of detailed terms and conditions to ensure that any potential distortions are minimised. Please see article 39 for more details, but requirements include the need to ensure that the fund or intermediary is fairly and transparently appointed; the aid should leverage in private investment such that this makes up at least 30% of the total financing; there must be a reasonable allocation of risk between private investors and



public authorities, and the fund or intermediary must be well managed on close to commercial terms.

#### **Article 40 – Investment aid for high efficiency cogeneration (combined heat and power or CHP)**

This article allows aid in support of newly installed or refurbished CHP projects which make overall primary energy savings by comparison with separate generation of heat and power in accordance with the energy efficiency directive (2012/27/EU).

The eligible costs are the extra costs and the maximum aid intensity is 45%. This aid intensity can be increased by 10% for medium companies and 20% for small companies; and by 15% for investments in [107\(3\)\(a\)](#) areas and 5% for investments in [107\(3\)\(c\)](#) areas.

#### **Article 41 – Investment aid for energy from renewable sources**

Investment aid of up to 15M may be provided to new renewable energy generation projects. Hydro power projects must comply with the water framework directive (2000/60/EC). Only sustainable biofuels production may be supported and aid may not be granted for food based biofuels, or biofuels which are subject to a supply or blending obligation.

It is necessary to choose the most appropriate way of calculating the eligible costs:

A) the extra costs in which case the maximum aid intensity is 45% or;

B) the total costs may be eligible for certain smaller installations where the counterfactual cannot be established because equivalent smaller scale conventional plants do not exist. In this case the maximum aid intensity is 30%.

Aid intensity can be increased by 10/20% for SMEs and by 15% for investments in [107\(3\)\(a\)](#) areas and 5% for investments in [107\(3\)\(c\)](#) regions.

#### **Article 42-43 – Operating aid for energy from renewable sources (including small scale generators)**

Operating aid may also be provided to new renewable energy generating projects. For installations of more than 500kw (3MW for wind), the following requirements apply:

- Energy must be sold in the market
- Aid must be provided in the form of a premium per unit of energy generated
- Operators must be subject to standard balancing responsibilities
- Aid is not permitted when prices are negative.

In general operating aid for renewable energy must be awarded on the basis of an open, technology neutral competitive bidding process. However, it is possible to limit the bidding process to new and innovative technologies making up to 5% of the planned new electricity capacity from renewable sources per year. Member states may also be able to limit auctions to avoid certain harmful effects, for example, to avoid distortions in raw materials markets. However a detailed assessment of this must be carried out and

submitted to the Commission when the scheme is registered. **Please speak to the state aid team if you wish to make use of this provision.**

Up to €15M may be provided to **small-scale renewables projects** of less than 1MW (or 6MW for wind) **without** the need to set up a competitive bidding process. The maximum aid which may be awarded per unit of energy is the difference between the levelised cost of generating energy and the market price for that form of energy.

#### **Article 45 - Investment aid for remediation of contaminated sites**

Remediation of polluted and contaminated sites may also be awarded aid of up to €20M. Only undertakings which are not liable for the damage caused may receive aid. The eligible costs are the total cost of remediating the land minus any increase in the value of the land and the maximum aid intensity is 100%.

#### **Article 46 - Investment aid for energy efficient district heating and cooling**

Up to €20M may be awarded towards a district heating or cooling project.

The eligible costs of the production plant are the extra costs involved in the construction, expansion and refurbishment of a generating unit relative to the conventional production plant. The maximum aid intensity is 45%. Aid intensity can be increased by 10/20% for SMEs and by 15% for investments in [107\(3\)\(a\)](#) areas and 5% for investments in [107\(3\)\(c\)](#) regions.

The eligible costs of the distribution network are the investment costs. However, the maximum aid should not exceed the difference between the eligible costs and the operating profit

#### **Article 47 - Investment aid for waste recycling and re-utilisation**

This article may be used for waste projects which go beyond state of the art and which handle the waste generated by undertakings other than the beneficiary (projects which handle the waste of the beneficiary may be supported under article 36 instead). The materials handled by the project must be treated in a more environmentally friendly manner than in the absence of the project. Projects must not increase demand for materials to be recycled without increasing collection of those materials.

Eligible costs are the extra costs. The maximum aid intensity is 35%. Aid intensity can be increased by 10/20% for SMEs and by 15% for investments in [107\(3\)\(a\)](#) areas and 5% for investments in [107\(3\)\(c\)](#) areas.

#### **Article 48 - Investment aid for energy infrastructure – up to €50m**

Eligible projects are listed in Article 2.130 of GBER. Infrastructure must be located in assisted areas. Infrastructure should be subject to full tariff and access regulation in line with internal market rules. Aid may not be given to electricity and gas storage projects or oil infrastructure.

Eligible costs are the extra costs. The aid amount should not exceed the difference between the eligible costs and the operating profit of the investment.

#### **Article 49 - Aid for environmental studies - up to €15m**

Aid may be granted in support of environmental studies which are directly linked to other types of projects which would be eligible for aid under the environmental aid section of GBER. Large enterprises may not receive aid for energy audits under the energy efficiency directive.

Eligible costs are the costs of the study and the maximum aid intensity is 50%. Aid intensity can be increased by 10/20% for SMEs.

Withdrawn

## Section 7: Aid for local infrastructures

### Overview

Investment aid for local infrastructures is covered by Section 13, Article 56 of the GBER. This article allows for the state to invest in infrastructure at a local level which contributes to improving the business and consumer environment and modernising and developing the industrial base (with the exception of airport and port infrastructure). The built infrastructure must be made available to users on an open, transparent and non-discriminatory basis, with the price charged corresponding to market price. Similarly, any concession to an operator of the infrastructure must also be assigned on an open, transparent and non-discriminatory basis with due regard to procurement rules.

### Aid intensities

If using this article, it is important to note that the aid amount must not exceed the difference between the eligible costs (of the investment) and the operating profit (which can be calculated either before or after the investment). In other words, the forecast or actual operating profit must be subtracted from the initial investment (to calculate the 'investment gap'), and the aid cannot be more than this. The maximum threshold for this to apply is €10m or the total costs exceeding €20m for the same infrastructure.

Withdrawn

# Chapter 6 - State Aid Modernisation (SAM) key changes

## Introduction to SAM

7.1 The Commission launched the State Aid Modernisation (SAM) process in May 2012<sup>32</sup> and completed the main work in July 2014. The aims of SAM were to streamline and simplify the rules and processes and link aid closely to growth. SAM was also intended to incentivise “good” aid – i.e. aid which meets a genuine market failure and had incentive effect. The process involved the review and revision of all the Frameworks and Guidelines as well as the procedural rules.

7.2 The Commission sees SAM as being very much a package which on the one hand gives Member States greater flexibility and reduces the administrative burden of giving aid and on the other hand gives them greater responsibility for transparency, evaluation and compliance. In the Commission’s country visit to the UK in June 2014, they were at pains to stress that this was a package and that they would expect us to co-operate in delivering our part. Greater freedoms were being given as less would now come under Commission scrutiny but that would entail greater responsibilities.

7.3 The chief freedom comes from the extension of the General Block Exemption Regulation (GBER) which allows aid to be given quickly and easily under simple administrative processes. This is important as the Commission envisages that 90% of all aid should in future be given under this Regulation. More types of aid are now included in this mechanism – for example, local broadband and small scale infrastructure – and there has been an increase in the amounts of aid which can be given, for example up to 15 million euros can now be given for industrial research as opposed to 7.5 million previously. The other rules set out in the Frameworks and Guidelines have also been streamlined and there are now more opportunities to give aid especially for energy.

7.4 However, the package also requires the following of Member States:

- Transparency: a publicly accessible register by July 2016 of individual awards of aid over 500,000 euros;
- Evaluation: a new requirement for some schemes under the new GBER to be evaluated in order to improve understanding of their impact and to learn lessons for future policy development.

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<sup>32</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0209&from=EN>

- Greater responsibility for compliance, including the need to do ad hoc monitoring of aid schemes.

## Transparency

7.5 Transparency promotes accountability and enables citizens to be better informed about public policies. A better informed constituency helps create a better dialogue between citizens and government officials and results in better policy decisions. There is a need for greater participation and accountability, particularly when it comes to how public resources are allocated.<sup>33</sup>

7.6 Transparency is an important part of State aid, as it promotes compliance, reduces uncertainties and enables companies to check whether aid granted to competitors is legal. Thus promoting a level playing field across Member States and companies in the internal market, this is very important in the economic context. Transparency facilitates enforcement for national and regional authorities by increasing awareness of aid granted at various levels. Finally, better transparency makes it possible to reduce reporting obligations and the administrative burden linked to reporting.

7.7 The transparency requirement applies in general to all State aid, except for smaller aid awards of less than €500.000.

7.8 There are new reporting requirements for individual awards under the GBER.

7.9 From 1/7/2016 Member States will need to report on all individual awards of aid made under GBER, and in excess of €500k on a transparency database. The following information will need to be published (as set out in Annex 3 of GBER).

- Name of the beneficiary
- Beneficiary's identifier
- Type of enterprise (SME/large) at the time of granting
- Region in which the beneficiary is located, at NUTS level II
- Sector of activity at NACE group level
- Aid element, expressed as full amount in national currency

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<sup>33</sup> [http://ec.europa.eu/competition/state\\_aid/modernisation/state\\_aid\\_transparency\\_en.pdf](http://ec.europa.eu/competition/state_aid/modernisation/state_aid_transparency_en.pdf)

- Aid instrument (Grant/Interest rate subsidy, Loan/Repayable advances/Reimbursable grant, Guarantee, Tax advantage or tax exemption, Risk finance, Other (please specify))
- Date of granting
- Objective of the aid
- Granting authority
- For schemes under Articles 16 (Regional Urban Development Aid) and 21 (Risk Finance Aid), name of the entrusted entity, and the names of the selected financial intermediaries
- Reference of the aid measure.

7.10 The format of the database is still under discussion, and this guidance will be updated, but you will need to ensure that you have the processes in place to provide this information to the BIS State aid team.

## Evaluation

**Evaluation** is the systematic collection and analysis of information about programmes and projects, their purpose and delivery; it derives knowledge on their impact as a basis for judgements. Evaluations are used to improve effectiveness and inform decision about current and future programming.

7.11 Evaluation is a new measure that is being implemented as part of the State aid modernisation programme (SAM) to ensure that schemes financed by State aid are more effective and create less distortion in competition. It will also improve efficiency of future schemes and possibly, of future rules for granting State aid. Please see **figure 4 'Do I need to evaluate?'** to determine whether the scheme you are planning on implementing requires evaluation.

7.12 The evaluation is not solely about State aid and the impact on competition and trade, but also covers many of the same areas as set out in the Green book, for example:

- Whether the public objective of the scheme has been met
- the direct incentive effect of the aid on the beneficiary to be assessed (i.e. whether the aid has caused the beneficiary to take a different course of action, and how significant the impact of the aid has been).



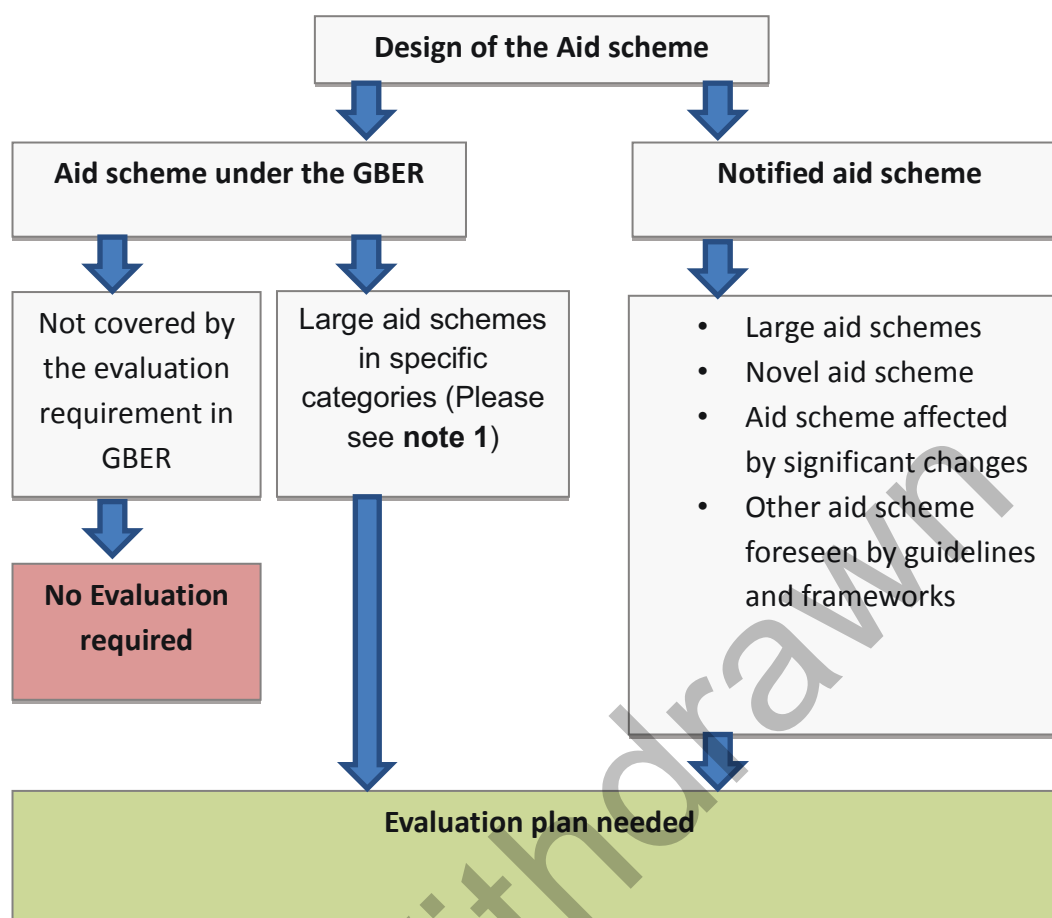
- the proportionality and appropriateness of the chosen aid instrument (loans, grants etc).

- 7.13 As an Aid giver it is necessary to draft a **comprehensive plan for evaluating a State aid scheme at an early stage, in parallel with the design of the scheme**. It is important to understand that State aid evaluations should normally be considered as **on-going evaluations** and need to be started whilst the aid scheme is still open in and operation, rather than purely as an exercise conducted after the implementation of the scheme is completed.
- 7.14 If systems for knowledge capture are not put in place at the start of the scheme, evaluation can be difficult due to incomplete data. Therefore, the evaluation plan must be submitted at the same time as the notification or GBER notification.
- 7.15 If you think you may have to conduct an evaluation, please refer to the [Commission guidance](#) and contact the State aid Team for advice on how to do this.

Withdrawn

## Figure 4- Do I need to Evaluate?

Figure 4 -Do I need to Evaluate?



**Note 1- Large aid schemes** are Aid schemes exceeding €150 million and from the following categories require Evaluation:

- Regional Aid (excluding regional operating aid)
- Aid to SMEs
- Aid for access to finance for SMEs
- Aid for research, development & Innovation
- Aid for environmental protection (excluding Aid in the form of reductions in environmental taxes under the Directives 200/96 EC)
- Broadband

[Please refer to the Commissions regulation on GBER](#)

# Chapter 7 - Services of general economic interest (SGEI) & the financial transparency directive

## Services of general economic interest (SGEI)



### Seek Advice!

Please seek advice from the BIS State aid team if you are planning to grant State aid in respect of SGEI, as we can help to advise on how best to ensure that you have the correct legal cover in place.

Please refer to the full text of the SGEI rules as the below is only an overview:

[http://ec.europa.eu/comm/competition/state\\_aid/legislation/sgei.html](http://ec.europa.eu/comm/competition/state_aid/legislation/sgei.html)

7.1 Services of General Economic Interest (SGEI) are not defined in the Treaty. There is no overarching EU definition. It is for individual Member States to define a particular service as an SGEI. The Commission and Court only have a role in determining whether the Member State has made a manifest error in defining the service as an SGEI.

7.2 In general SGEIs tend to be public services (such as gas, electricity, postal services, public service broadcasting and lifeline public transport links) that the market does not provide or does not provide to the extent or at the quality which the state requires, AND is a service in the general and not the particular interest, that means that the service should be open to the public. The service has to be economic, and there has to be an entrustment of the provision of this service to an undertaking.

### State Aid for SGEI

7.3 Funding of SGEI is in principle caught by the State aid rules as the state is providing an undertaking with financial support to deliver a service.

7.4 In order to ensure legal certainty on how such support can be provided in a State aid compliant way, the Commission have come forward with three sets of rules allowing for different levels of support:

- **For support of up to €500k<sup>34</sup> over any three year period, there is the SGEI De Minimis Regulation.** The regulation applies to aid given as a grant, a loan or a loan guarantee, and provided that the form of the aid meets specified transparency requirements. There must also be a form of entrustment between the beneficiary and the aid grantor. Aid given under the regulation does not need to be notified to the European Commission, but as with regular De Minimis aid, the aid grantor must inform the recipient that it is being given as De Minimis aid.
- **Support of up to €15m per annum is block exempted (no cap for social housing, hospitals and a number of defined social services) under the SGEI Decision.** As with SGEI De Minimis there must be a form of entrustment between the beneficiary and the aid grantor: the Decision specifies what needs to go into an entrustment document, and that the entrustment period should not exceed 10 years unless justified. The Decision also sets out limits on the amount of compensation and its calculation (which is linked to the cost of provision of the SGEI), and Member States are required to check regularly that the recipient is not receiving compensation above the determined amount. While there is no notification requirement where the Decision is relied upon, Member States need to report on aid given under the Decision every two years. So it is important that you advise BIS if you are using the Decision as legal cover for any aid for SGEI.
- **Aid for SGEI that cannot be granted under SGEI De Minimis or the SGEI Decision must be notified under the SGEI Framework and approved by the European Commission before it can be granted.** The framework typically covers aid for large network public services where the concern over potential distortion of competition is greater, and thus approvals can take time. It is essential therefore that if you think that you may need to notify under the SGEI Framework that you discuss this with the BIS State aid team in good time.

## The financial transparency directive

7.5 The Financial Transparency Directive<sup>35</sup> (FTD) is aimed at ensuring that financial relations between public authorities and certain undertakings are transparent. Its purpose is to underpin the State aid regime by requiring aid to be made transparent: both in terms of what funds have been made available to certain undertakings, and the use to which those funds have in fact been put. Without such transparency, there is a real risk that the Commission's state aid regime will be unable to expose funding which is not easily identifiable as State aid and identify funding that may seep into an organisation's commercial activities, thereby cross-subsidising those areas with public funds.

7.6 The Directive obliges public undertakings as defined in the Directive (and amongst other conditions, whose annual turnover is at least €40m), to maintain information on

<sup>34</sup> Calculating aid over the 3 year period, this should include aid from all sources (including general de minimis) and not just under SGEI de minimis.

<sup>35</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0111&from=EN>

the support that they receive from public authorities and make this available on request.

7.7 In addition, undertakings (whether private or public) and entrusted with the provision of an SGEI or that enjoys a special or exclusive right granted by a Member State are obliged to ensure that their accounts are sufficiently separated to distinguish between these different activities, with all costs or revenue assigned or allocated appropriately, and clear accounting principles established for the separate accounts.

7.8 Finally public undertakings engaged in the manufacturing sector with an annual turnover of at least €250m are required to supply certain specified information including details of their annual reports and accounts to the Commission on an annual basis.

7.9 The UK has implemented the Transparency Directive via the Financial Transparency (EC Directive) Regulations 2009 (as amended).

Withdrawn

# Chapter 8 – Beyond the GBER: Aid Requiring Prior Notification and Approval

## Introduction

- 8.1 The Commission has developed a number of guidelines and notices setting out the criteria that it applies in considering certain other categories of aid, including aid to specific sectors. You must notify and obtain **prior** approval from the Commission for proposed schemes or payments under these. Awarding aid without approval would make it unlawful aid (unless block exempt – see [chapter 5](#))
- 8.2 Please see **Figure 5** for the Notification hierarchy **Figure 6** for the notification process.
- 8.3 It is possible to notify very simple amendments to some schemes using a simplified form which in principle can be approved much more quickly. Simpler aid measures which very closely fall within guidelines or frameworks or which mirror existing precedents may be notified using a simplified procedure set out in this Commission notice<sup>36</sup>. However the use of the simplified procedure is at the Commission's discretion and, although a faster approval is more likely for measures using either the simplified form **or the simplified procedure, it cannot be guaranteed.**

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<sup>36</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0616\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0616(01)&from=EN)

Figure 5- Notification 'hierarchy'

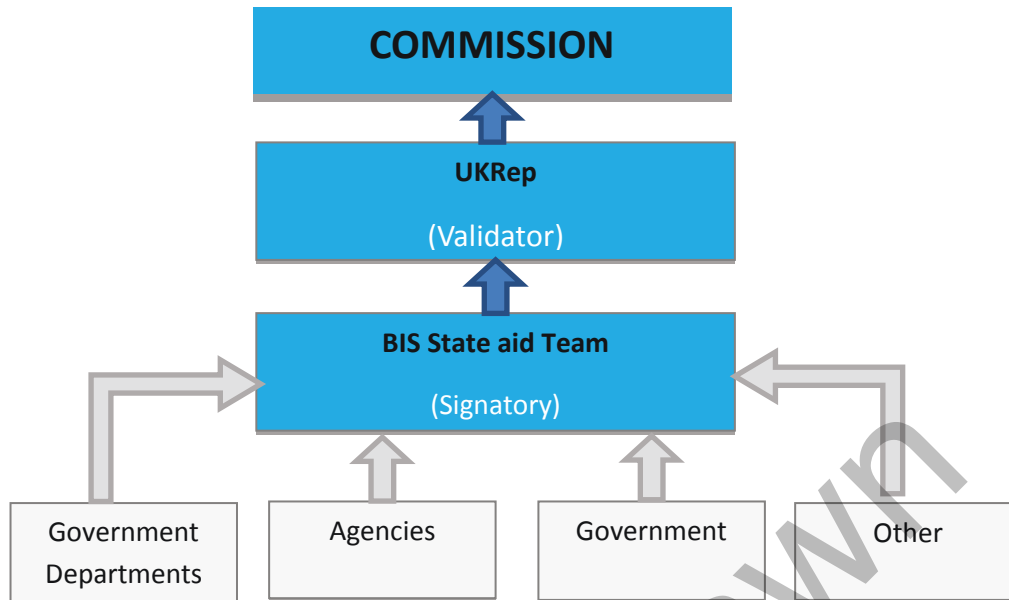
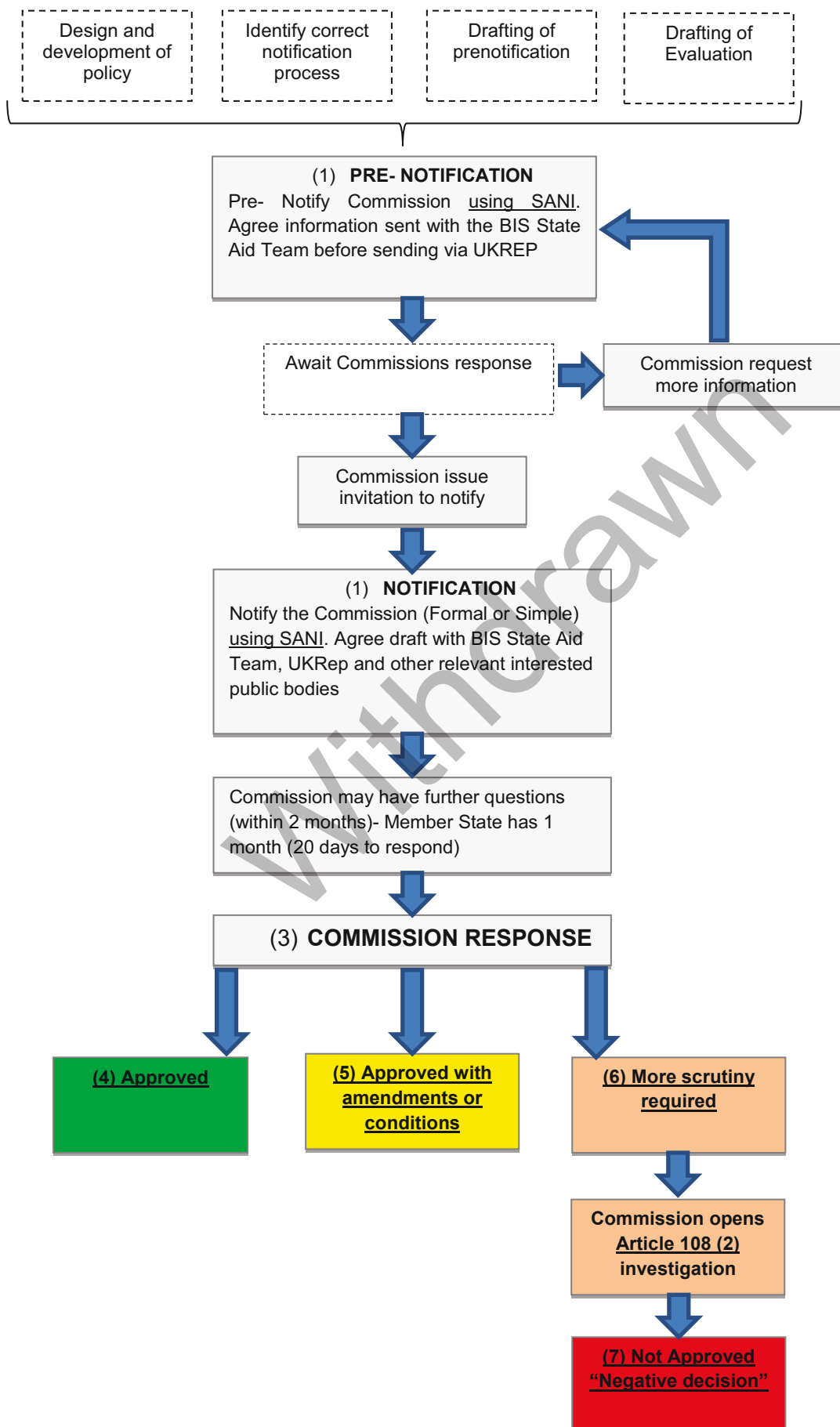




Figure 6 Notification Process



## Pre-notification & Notification Process

### Key:

**Pre notification and notification-** are the processes by which you inform the Commission of Aid you wish to grant, with the objective of seeking their approval to grant Aid lawfully.

**SANI-** The Commissions online State aid notification system. It is the system by which you submit a notification and receive official responses from the Commission.

### Policy Design and Development

8.4 Consider carefully whether your measure can be implemented through other non-aid frameworks. Aid measures (even simple ones) can take **at least** 6-12 months to be approved and potentially far longer. The timing for this process is not within our control, this depends on issues such as the wider case load and issues arising from other Member States and the Commission's objective objectives and priorities. There is also no guarantee that notified aid measures will be approved. It may be necessary for changes to be made to schemes before they can be approved which may lead to additional delay.

8.5 It is essential to ensure this uncertainty and timing and resource required for State aid approval process is factored into the project plans (for example, how would any changes will be communicated to stakeholders and implemented?, might changes in legislation be required?). State aid team can help you to understand risks and how to manage these. If you think the assistance that you are providing is State aid that requires notification: then seek advice early on how to grant this lawfully.

8.6 The best way to prepare for the notification process and ensure you understand the risks involved and how to manage these is to understand the guidelines and frameworks which apply and how your measure fits with these. This will enable you to develop a strong evidence base and a case showing compliance with these. Again, State aid team can advise on this.

8.7 Once you understand the issues and risks around your scheme design you will need to factor this into your thinking and/or adapt the design of the Aid as necessary to stand the best chance of obtaining approval in time.

### The Notification Process

8.8 As the managing public authority granting the Aid you are responsible for ensuring you understand the requirements which apply to your Aid measure. You must prepare a pre-notification and a notification which uses evidence to demonstrate that you fully meet these. The BIS State aid team can help with this, please speak to us as soon as possible if you are considering notifying an aid measure.

### Pre-notification Period

- 8.9 The first stage in the notification process is to draft and submit a pre-notification. The pre-notification is essentially a draft notification. You should use the standard notification forms as well as any supporting information you need to attach. You should aim to complete as much relevant information as possible, this is one way of expediting the process. However at the prenotification stage it is possible to pencil in some information and use the prenotification period as a way of seeking feedback on areas of uncertainty.
- 8.10 A notification should contain all the information and argument necessary to verify that the measure fits with the aid guidelines or framework in question or that it passes the balancing test. Provide this in a way which is clearly targeted towards the requirements as set out in the guidelines or frameworks. This makes it easier for the Commission to assess the case and the case is then more likely to be handled more efficiently and quickly. Try not to over provide and overload information as the Commission do read absolutely everything which is submitted more than once and this can result in delay or could mean you inadvertently reveal information which is unhelpful towards the case. So, for example, it is not usually necessary or helpful to provide full consultation documents although excerpts of information and findings from these documents might be useful supporting evidence.
- 8.11 Ensure your notification contains a full and clear description of the measure – how much? to whom? for what and when? Make sure you think about everyone that could possibly benefit from the measure not just the direct beneficiaries.
- 8.12 BIS state aid team will need to clear your prenotification before it is submitted so please speak to us and ensure sufficient time is factored in for this. Once the prenotification is agreed it can be submitted via SANIt to the BIS State aid team for sign off before it goes to UKREP for final validation and finally the Commission.
- 8.13 The Commission will consider and assess the prenotification and respond with questions and clarifications. They may respond requesting discussion. You should aim to respond to such requests as rapidly, cooperatively and clearly as possible. This process of requesting and providing information is an iterative process which can go on for some time during which you will work with the Commission to resolve uncertainties and problems until the Commission are satisfied that the Aid measure can be approved.
- 8.14 All communication with the case team is done via BIS state aid team and UKREP. The state aid team will usually attend all meetings on state aid cases. This is so we can advise you on how to best make and manage your case, monitor the overall case load and ensure that the UK is not presenting conflicting arguments..
- 8.15 When a good notification is put together and the case for approval is clear and simple (e.g. small amounts of aid based closely on the guidelines or precedents) it is usually quicker and easier to communicate with the Commission case team via email. This can be faster as the Commission team do not then need to write meeting notes for

their case file. When a case is more complex and uncertain however it is sometimes helpful to travel to Brussels to meet with the Commission case handlers in person. UKREP and BIS will advise whether this is likely to be necessary.

## Final Notification

- 8.16 The pre-notification stage is complete once the Commission are satisfied that the aid is approvable and the notification broadly complete. The Commission will then invite you to formally notify. The invitation may contain further questions or clarifications which you are expected to include in the final notification. The formal notification should be submitted via SANI.
- 8.17 After a successful pre-notification there should not be a need for further questions/clarifications and approval should be granted within 2 months, but this can take longer as the Commission's legal and other services may not formally engage with the case until this stage.
- 8.18 Legally it is permitted to jump straight to formal notification without having pre-notified, but this is not generally advisable as may lead to delays and problems. Please speak to State aid team if you wish to consider this.

## The Balancing Test

- 8.19 The Commission's assessment of the approvability of state aid measures and the requirements set out in the guidelines and frameworks are based on a number of questions which are aimed at establishing whether the negative impacts on competition have been limited and are justified by the positive effects. Aid measures which are novel or which fall outside of guidelines and frameworks will be assessed directly against these principles in greater detail. Please contact the state aid team who can help you understand and consider these questions:
- Is the aid measure **necessary** to achieve a well-defined objective of common EU interest? (What are you trying to do? How does this align with EU policy objectives?)
  - Is the aid measure **well designed** to deliver this objective, in particular:
    - Is the aid measure an **appropriate instrument**? Could there be other non-aid or lower aid instruments, why are these not appropriate? (e.g. regulation, information/education, why is this not appropriate or effective?)
    - Is there an **incentive** effect? (e.g. does the aid change the behaviour of the beneficiary? What is the counterfactual position (i.e. what happens in the absence of aid – maybe the project does not happen or is different, more restricted, smaller, less beneficial)).
    - Is the aid **proportionate**? (e.g. could the same change in behaviour be obtained with less aid, how has it been minimised? Compare NPV (Net Present Value), additional costs etc to counterfactual to justify aid amount).

- **Are distortions on trade and competition limited** so that the overall balance is positive? (Assess the market and analyse potential impact on competition, show how this has been minimised).

### State Aid Modernisation (SAM)

#### New Procedure: Evaluation

A comprehensive evaluation plan must be drafted at an early stage alongside the design of the scheme (as part of the pre-notification). This plan must then be carried out once Aid is granted.

### Notification process top tips

- Allow sufficient time; make contingency plans in case of unexpected problems!
- Expect the unexpected. The Commission can and do raise unexpected issues.
- It is difficult for the Commission to assess a moving target and they will not be able to come to a final view where a policy measure changes over the prenotification period. Try to finalise policy as much as possible before beginning and don't start the notification process until you are ready
- Read and understand the requirements of the state aid framework or guidelines you are using. Ensure the information in your submission is targeted towards demonstrating that the aid measure meets these. Understand where weaknesses lie and be prepared to provide further evidence or adapt the aid measure.
- Don't make assertions, provide evidence.
- Think about justifying the measure from an EU rather than a UK policy perspective.
- Where your measure is novel or difficult or you are unclear what the requirements in the guidelines or frameworks mean, consider and focus on demonstrating compliance with the underlying balancing test principles.
- If you are unsure of compliance or interpretation of a particular requirement please speak to State Aid Team about this and we can help you to understand and manage any risk which arises.

### Identify Notification Process & Forms

8.20 At present the Commission is reviewing all forms in light of State aid modernisation, please check requirements with the State aid team. In most cases you will use the "general information form" in annex I of regulation 271/2008. This is completed directly onto SANI.

8.21 Regulation 794/2004 Article 4 allows member states to use a simplified form for very straightforward changes to existing aid schemes. If the simplified form is used this means that the case is likely to be very simple and that there will be a shorter approval process than for a brand new measure:

- o Simple increase in the budget of more than 20%
- o Simple prolongation of an aid scheme by up to 6 years
- o Tightening of eligibility criteria, reduction in aid intensity or reduction of eligible costs

Withdrawn

# Chapter 9 – Rules for specific sectors

The Treaty has additional provisions for certain sectors and the Commission has adopted frameworks and rules defining its approach to State aid in particular industries<sup>37</sup>.

## Agriculture, fisheries and aquaculture

The general State aid rules described here do not apply, or apply only to a limited extent, in the sectors producing and marketing products of agriculture and fisheries. The rules applying to these sectors are laid down in Treaty Articles 3838 to 42 and the Community Guidelines for State aid in the agriculture and forestry sectors 2007 to 2013 and in the Community Guidelines for the examination of State aid to fisheries and aquaculture<sup>38</sup>. The Department for Environment, Food and Rural Affairs (DEFRA) provides advice on the rules applying in these sectors.

## Broadband

Legal basis:	<p><a href="#">EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (2013/C 25/01)</a></p> <p><a href="#">Commission Regulation (EU) declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty No 651/2014 (Article 52)</a></p>
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The Community Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks were introduced in 2012 and the general block exemption in 2014. The Guidelines set down the circumstances in which the Commission will consider public sector support for the development of both first generation broadband and next generation access. If you are planning to provide State aid to broadband deployment please can you contact the BIS State aid team and/or [The Department for Culture, Media and Sport](#).

## Sensitive Sectors

Special rules apply to some sectors which are considered sensitive because of the level of distortion in competition that may arise if State aid is applied to the sector concerned:

- the coal and steel industry (ECSC and non-ECSC)

<sup>37</sup> [http://ec.europa.eu/comm/competition/state\\_aid/legislation/specific\\_rules.html](http://ec.europa.eu/comm/competition/state_aid/legislation/specific_rules.html)

<sup>38</sup> [http://ec.europa.eu/agriculture/stateaid/leg\\_en.htm](http://ec.europa.eu/agriculture/stateaid/leg_en.htm)

[http://ec.europa.eu/fisheries/contracts\\_and\\_funding/state\\_aid/index\\_en.htm](http://ec.europa.eu/fisheries/contracts_and_funding/state_aid/index_en.htm)



- synthetic fibres sector
- shipbuilding.

For these sectors, the State aid rules are, in general, more restrictive than the rules applying to other industries. Officials should bear in mind that the Commission will tend to take a more cautious approach when considering cases or complaints about aid in these sectors. The possibility of aid for investment leading to increased production capacity may be severely limited or even prohibited. In some cases, aid is allowed only on condition that it is accompanied by capacity reductions. Special notification requirements are imposed on Member States (obligation to notify the Commission of each case individually, even if there is an approved national State aid scheme).

## Transport

Regional aid cannot be given to activities in the transport sector as well as the related infrastructure<sup>39</sup>. This is defined as transport of passengers by aircraft, maritime transport, road or rail and by inland waterway or freight transport services for hire or reward. The De minimis regulation restricts De minimis aid in relation to road freight transport to €100,000 over three years.

Please contact the [Department for Transport](#) if you require advice on the State aid rules for transport.

Withdrawn

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<sup>39</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0651&from=EN>

# Chapter 10 – European Structural and Investment Funds (ESIF) and State aid

## Use of European Structural and Investment Funds (ESIF) as State aid

Structural Funds are the European Union's main instruments for supporting social and economic restructuring across the Union.

Although a form of European funding, Structural Funds are still considered a State resource as the national government influences how they are spent. The Structural Funds regulation requires the Managing Authority to ensure that all operations for an approved Structural Fund programme comply with the State aid rules.

Some uses of the Structural Fund do not come within the scope of the State aid rules but only where this does not meet one of the tests of aid e.g. support for an infrastructure project of general public benefit (and not for commercial use) that has been tendered. Where individual application of the Funds does involve State aid, the Managing Authority must ensure that the Structural Funds contribution as well as the other public funding complies with State aid rules. Structural funds audit processes do consider state aid compliance so there is a slightly higher risk that non-compliant aid will be discovered if this is structural funds.

The Structural Fund regulations require the designated managing authority to ensure all ESIF funded programmes comply with State aid rules.

# Annex A – Interpretation of the four tests for state aid: precedents from case law and Commission communications

This Annex provides further clarification on the four state aid tests by highlighting some important cases and Commission decisions under each of the tests. Please see the Commission's draft communication on the notion of aid<sup>40</sup> for further guidance on interpreting the four tests of aid. If you are unsure or need advice on interpreting the tests please seek advice from the state aid team.

A Commission decision on whether a measure meets the definition of a state aid, and whether the Commission followed the correct procedures in reaching a state aid verdict can be appealed to both the Court of First Instance and the Court of Justice of the European Union (CJEU). However, the Courts do not rule on whether a state aid is compatible with the Treaty or not – this decision is left exclusively to the Commission.

## State Resources

The concept of state resources applies to any advantage granted directly **or indirectly**, financed out of state resources.

In Cases *C/67,68 and 70/85 Gebroeders van der Kooy v Commission* which concerned an allegedly preferential gas tariff for the Dutch horticultural industry the Court examined the ownership and management of the Dutch gas company Gasunie. The Dutch state owned 50% of the shares of the company and was also empowered to approve their tariffs. These factors demonstrated that the contested tariff was the result of action by the state and was caught by the state aid rules.

In contrast, in Case *C329/98, Preussen Elektra* German legislation compelled regional electricity supply companies to buy a proportion of their needs from renewable sources at a premium cost.. There was a mechanism in the legislation requiring the suppliers and the network operators to share the additional costs among themselves. The court found that the state aid rules did not apply as the companies involved were privately owned. The subsidies under the scheme were therefore met entirely from private resources. The Court found that neither the statutory obligation introduced by the German rules, nor the allocation of the financial burden between private supply undertakings and private operators of upstream electricity networks involved a direct or indirect transfer of State resources.

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<sup>40</sup> [http://ec.europa.eu/competition/consultations/2014\\_state\\_aid\\_notion/draft\\_guidance\\_en.pdf](http://ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf)

## Selectivity

State aid rules will not apply to measures which benefit all undertakings within a member state without distinction being made between them – only to measures which benefit certain products or undertakings, types of undertakings, sectors or regions.

Entirely general taxation measures (eg. tax deductions) which apply to all undertakings on the basis of uniform and objective criteria will not constitute state aid. However where a measure provides an exception or different treatment in favour of certain undertakings there could be state aid.

In *Case 173/73 Italy v Commission*, the Court ruled that the selective nature of a tax measure may be justified by ‘the nature or general scheme of the tax system’. If so, the measure is not considered state aid. The Commission’s Notice on the Application of the State aid rules to measures relating to direct business taxation (*OJ 1998 C384/3*) sets out further how this is to be interpreted. A tax measure whose main effect is to promote one or more sectors of activity constitutes aid, and so a derogation from the base rate of corporation tax for an entire section of the economy normally constitutes State aid. However, measures whose economic rationale makes them necessary to the functioning of the tax system may not constitute State aid. And the progressive nature of a profit tax scale is justified by the redistributive purpose of the tax.

## Undertakings

An undertaking is defined in CJEU Case C-41/90 *Hoefner and Elser*, as any entity engaged in economic activity regardless of the legal entity or the way in which it is funded.

An entity is engaged in economic activity when it is offering goods and services on a market (T-319/99 *Fenin*)

The state aid rules do not apply where the State is carrying out a non-economic activity in its capacity as a public authority. Useful guidance as to what constitutes a non-economic activity can be found in the Commission’s Communication on Services of General Economic Interest<sup>41</sup>. Matters which are intrinsically the prerogative of the state (such as air traffic control) are not of an economic nature; national education and basic social security schemes are fulfilling a social function; and other activities where the function is social rather than commercial (including trades unions, churches, charities and aid organisations). However, whenever market mechanisms have been introduced into activities which intrinsically form part of the prerogative of the state, state aid law is applicable.

In the *Brighton West Pier case (N560/01 and NN 17/02)*, the Commission decided that the Pier Trust was an undertaking to the extent that it was charged with the management and profitable usage of lettable space on the pier to generate revenue for the preservation and restoration of the pier and possibly also for the operation of a heritage centre. In the Irish Housing Finance Agency case *N209/2001* the Commission found that local authorities

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<sup>41</sup> Commission’s Communication on Services of General Economic Interest (2012 8/02), para 2.1.1

in Ireland which provided low cost housing were performing an economic activity and were therefore undertakings because they were in direct competition with other housing market operators in offering cheaper housing conditions, through rents and construction loans to certain consumers..

In the Capital Allowances for Irish hospitals case *N 543/2001*, the Commission took the view that hospitals offering both private and public healthcare were undertakings. .

### Conferring advantage and the state as a market economy operator

In Case *C39/94 SFEI v La Poste*, the Court ruled that in order to determine whether a state measure constitutes State aid, it is necessary to establish whether the recipient receives an advantage which it would not have obtained under normal market conditions.

In case *T123/97, Salomon SA v Commission*, state controlled banks, along with private sector banks, agreed to waive a proportion of the debts of a particular debtor in difficulty. The measure did not constitute aid since the action of the public banks was justified on economic grounds. In the event of the beneficiary's insolvency, the banks would be liable to lose a still greater amount of their debt.

Following a number of cases involving the sale of public land, the Commission issued a Communication (OJ 1997 C 209/3). This sets out that a sale of publicly owned land and buildings following a sufficiently well publicised, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid is by definition a sale at market value and consequently does not contain State aid. If this open bidding procedure is not used, an independent evaluation must be carried out by one or more independent asset valuers prior to the sale negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards.

### The aid distorts or threatens to distort competition

The threshold for this element is relatively low.

In Case *730/79 Philip Morris v Commission*, the Advocate General said "it is permissible ....to start from the presumption that any public aid granted to an undertaking distorts competition – or threatens to distort it where the aid is only proposed and not yet granted – unless exceptional circumstances exist (for example the total absence in the common market of products which are identical to or may be substituted for those manufactured by the recipient of the aid)".

Nevertheless the European Commission is required to carry out at least some analysis of the situation of the relevant market and the position of the aid recipient and its competitors to show that aid has an impact on competition. It must show that the aid would have a real rather than a wholly theoretical effect on the market. Further the Commission must show that the aid recipient has obtained an appreciable advantage over its competitors (See case *T-396/06 Holland Malt BV and the Netherlands v the Commission*).

### Intra-Community trade

The Commission's guidelines on aid for Deprived Urban Areas (*OJ 1997 C146/6*) have now been withdrawn, but the Commission has stated the underlying principles of these still apply. They contain a list of "local activities" – that is activities which could be considered not to affect intra community trade. These are the following activities – where undertaken by small enterprises:

- construction;
- sale maintenance and repair of motor vehicles; automotive fuel;
- retail trade; repair of personal and household goods;
- hotels and restaurants;
- health and social work;
- other community social and personal service activities; and
- social services.

As seen above, in decisions N560/01 and NN17/02 the Commission did consider that the Brighton Pier Trust was an undertaking because the management and profitable usage of lettable space on the pier and possibly also the running of a heritage centre were economic activities. However, they decided that the subsidy was not likely to affect trade between Member States because the subsidy was unlikely to mean that more foreign visitors were attracted to the pier. They added that restoration of existing monuments did not affect trade.

In contrast, Terra Mitica is a large holiday theme park near Benidorm. In Commission Decision 2002/227/EC The Commission took the view that the size of the park meant that it was not a regional park but was a "destination park" i.e. one that tourists from other Member States would deliberately set out to visit and was thus capable of affecting intra-community trade. The fact that according to the Spanish authorities most of the visitors were from the local region was dismissed by the Commission who pointed out that there was active policy of attracting visitors from abroad.

In case *N258/2000 Leisure Pool Dorsten*, the Commission found that a £2m grant given to a swimming pool which was used recreationally in a small community in Germany was not likely to have any effect on trade. It held that there was a clear difference between this and aid to promote major theme parks targeted at the national or even international market and advertised far beyond the area where they are located.

# Annex B – *De minimis* sample offer letters

## Template *De minimis* letter 1 : Eligibility to receive *De minimis* aid.

**This letter can be used to determine the Value of any *De Minimis* aid previously received by a beneficiary, in order to ascertain whether there is scope to give (further) *De minimis* aid.**

**Aid administrators may also wish to build the relevant information into their application forms, depending on the nature of the *De minimis* scheme being operated.**

Dear

[SCHEME TITLE (IF APPLICABLE)] STATE AID: DE MINIMIS AID

In order to minimise distortion of competition the European Commission sets limits on how much assistance can be given without its prior approval to organisations operating in a competitive market. This letter sets out what is needed to ensure compliance with those limits. You should note carefully the requirements and the obligations. If you have any queries please discuss them with the aid administrator.

Under EC Regulation 1407/2013 (*De Minimis* Aid Regulation) as published in the Official Journal of the European Union 24 December 2013<sup>42</sup>, the support provided is a *De minimis* aid. There is a ceiling of €200,000 [€100,000 for undertakings in the road freight transport sector] for all *De minimis* aid provided to any one organisation over a three fiscal year period (i.e. your current fiscal year and previous two fiscal years). Any *De minimis* aid provided to you under this scheme will be relevant if you wish to apply, or have applied, for any other *De minimis* aid. The value of the aid under this scheme is (or estimated to be by calculating the gross grant equivalent). You will need to declare this amount to any other aid awarding body who requests information from you on how much *De minimis* aid you have received. For the purposes of the *De minimis* regulation, you must retain this letter for 10 years from the date on which the aid is granted and produce it on any request by the UK public authorities or the European Commission. (You may need to keep this letter longer than 10 years)

**Please advise us now of any other *De minimis* aid** which your enterprise and any enterprises linked to it may have received during your current and previous two fiscal years, as we need to check that our support added to that previously received, will not exceed the threshold of €200,000 (€100,000 for undertakings in the road freight transport

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<sup>42</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352 24.12.13, p1.



sector) over the last 3 fiscal years. De Minimis Aid includes not only grant but also assistance such as free or subsidised consultancy services, marketing advice etc. If you are in any doubt about whether previous assistance received classes as De minimis assistance please include it.

Please sign the attached statement confirming your eligibility for support.

**Statement of De minimis aid received**

I confirm that I have received the following De minimis aid during the previous 3 fiscal years (i.e. current fiscal year and the previous two fiscal years):

Body providing the assistance/aid	Value of assistance (calculating the Gross Grant Equivalent)	Date of assistance

**DECLARATION:**

Company	
Client Name	
Signature	
Date	

I acknowledge that if I fail to meet the Eligibility Requirements, I/we shall become liable to pay the full price that would otherwise be payable in respect of the services received.

Yours Sincerely,



## Template De minimis letter 2 : Offer of De minimis aid.

Dear,

[SCHEME TITLE (IF APPLICABLE)] STATE AIDS: DE MINIMIS AID

In order to minimise distortion of competition, the European Commission sets limits on how much assistance can be given without its prior approval to organisations operating in a competitive market. This is a De Minimis offer letter for the value of the aid (Gross Grant Equivalent) under this scheme of.

The support being provided is De minimis aid under EC Regulation 1407/2013 (De Minimis Aid Regulation) as published in the Official Journal of the European Union 24 December 2013<sup>43</sup>,. There is a ceiling of €200,000 [€100,000 for undertakings in the road freight transport sector] for all De minimis aid provided to any one organisation over a three fiscal year period (i.e. your current fiscal year and previous two fiscal years). **You must declare this amount if asked in the future to any other aid awarding body.** For the purposes of the De minimis regulation, you must retain this letter for from the date on which the aid is granted and produce it on any request by the UK public authorities or the European Commission. You may need to keep this letter longer than 10 years.

Yours sincerely,

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<sup>43</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ L 352 24.12.13, p1.

# Annex C – The Financial Transparency Regulations

## Introduction

1. The Financial Transparency (EC Directive) Regulations 2009 (S.I. 2009/2331) implement Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on transparency within certain undertakings (“the Directive”).
2. The Regulations support the European Community state aid system by requiring both public and private undertakings in receipt of public funds:
  - to ensure their accounts are sufficiently transparent to expose the funding they receive from public authorities and
  - to ensure that their accounts are sufficiently transparent to avoid overcompensation for delivery of public service obligations and cross subsidisation of commercial activities by public funds.
3. This guidance is intended to help you to decide:
  - Whether your organisation falls within one or more of the categories of undertakings to which the Regulations apply.
  - Whether the organisation benefits from any of the exemptions from the Regulations.
  - If the organisation is not wholly exempted, what obligations the proposed Regulations impose.

## Categories of undertakings covered by the regulations

4. The Regulations apply to three categories of undertakings. An organisation may fall within more than one of these categories.
  - Public undertakings
  - Undertakings that are granted an exclusive right or a special right and also carry out other activities OR that are entrusted with a service of general economic interest and receive public service compensation in relation to that service and also carry out other activities. Note: this includes both public and private undertakings.
  - Public undertakings operating in the manufacturing sector

## Categories of an undertaking – Key definitions

5. Many of the terms used in the Regulations are defined in regulation 2. However some of the terms used are not defined fully in the regulations and where this is the case, Community law and other precedents are used to provide guidance on what they mean.

## Undertaking

6. Regulation 2 defines the term undertaking is :
7. Any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed”.
8. Economic activity is not defined in the regulations but in the case law of the European Court of First Instance and the Court of Justice of the European Union as “any activity consisting in offering goods and services on a given market” (see for example T-319/99 Fenin). The same entity may engage in both economic activity and non-economic activity; that entity is then an undertaking when, and to the extent that, it is engaging in an economic activity.

## Public undertaking

9. Regulation 2 defines a **public undertaking** as:

“any undertaking over which a public authority may exercise, directly or indirectly, a dominant influence by virtue of its ownership of it, its financial participation therein, or the rules which govern it; a dominant influence is presumed when a public authority, directly or indirectly, in relation to an undertaking:

- holds the majority of the undertaking’s subscribed capital;
- controls the majority of votes attaching to shares issued by the undertaking; or
- can appoint more than half the members of the undertaking’s administrative, managerial or supervisory body”.

Note: this is a list of circumstances in which a public authority is presumed to exercise a dominant influence: it does not rule out the possibility that a public authority exercises a dominant influence in other circumstances.

10. *To sum up, an organisation falls within the “public undertaking” category if, and when, it is an entity over which a public authority may exercise, directly or indirectly, a dominant influence and which offers goods or services in a market.*

## Public Authority

11. Regulation 2 defines a **public authority** as including the Crown and any regional, local or other territorial authority.
12. It is possible for some of the activities which an entity undertakes to be those of a public authority (e.g. regulatory in nature), whilst others are economic activities. It is also possible for some of the activities of central and or local government to be economic activities. A body will be an undertaking when, and to the extent that it is, engaging in the economic activity.

## Exclusive and special rights

13. Regulation 2 defines an **exclusive right** as:

“any right granted by a public authority to an undertaking through any legislative, regulatory or administrative means, reserving to it the right to provide a service or undertake an activity within a geographical area”.

Possible examples of economic activities for which an exclusive right may be granted include the provision of a passenger rail and or ferry service.

14. Regulation 2 defines a **special right** as:

“any right that is granted by a public authority through any legislative, regulatory or administrative means, which, within a geographical area and otherwise than according to objective, proportional and non-discriminatory criteria:

- limits to two or more the number of undertakings authorised to provide a service or undertake an activity;
- designates several competing undertakings as being authorised to provide a service or undertake an activity; or
- confers on any undertaking or undertakings any legal or regulatory advantages which substantially affect the ability of any other undertakings to operate the same activity in the same geographical area under substantially equivalent conditions”.

15. The Commission’s Interpretative Communication on concessions under Community law gives an insight into its understanding of the meaning, in particular, of **proportional and non-discriminatory criteria**. The Communication points out that:

“The principle of proportionality is recognised by the established case law of the Court as ‘being part of the general principles of Community law’; it also binds national authorities in the application of Community law, even when they have a large area of discretion.

16. The principle of proportionality requires that any measure chosen should be both necessary and appropriate in the light of the objectives sought. In choosing the measures to be taken, a Member State must adopt those which cause the least possible disruption to the pursuit of an economic activity”.

17. As regards non-discriminatory criteria, the Communication points out that:

“According to the established case law of the Court ‘the general principle of equality of treatment, of which the prohibition of discrimination on grounds of nationality is merely a specific enunciation, is one of the fundamental principles of Community law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified’.

18. Moreover the Court asserted that the principle of equality of treatment ‘forbids not only overt discrimination by reason of nationality...but all covert forms of

discrimination which, by the application of other criteria of differentiation, lead in fact to the same result'.”

19. More generally, special rights awarded through a process that accords, mutatis mutandis, with the EU procurement rules are likely to be considered to be granted according to objective and non-discriminatory rules.

## Public undertaking operating in the manufacturing sector

20. Regulation 2 defines a **public undertaking operating in the manufacturing sector** as:

“any public undertaking which has at least 50% of its total annual turnover arising from operations which are included in Section D of the Annex to Council Regulation (EEC) No 3037/90 of 9 October 1990 on the statistical classification of economic activities in the European Community” .

21. Neither the Regulations nor the Directive define total annual turnover. However net turnover has been defined elsewhere as:

"comprising the amounts derived from the sale of products and the provision of services falling within the company's ordinary activities, after deduction of sales rebates and of value added tax and other taxes directly linked to the turnover" .

Only turnover from an economic activity need be included in total annual net turnover.

22. To sum up, an organisation falls within this category if, and when, it is an entity over which a public authority may exercise, directly or indirectly, a dominant influence and that offers goods or services on a market, and that has at least 50% of its total annual turnover arising from manufacturing operations.

## Requirements of the regulations and the Directive

### Public undertakings

23. A public undertaking to which the Regulations apply must:

- maintain records of any public funds which are made available to it either (i) directly by a public authority, or (ii) by a public authority through another public undertaking or financial institution. (Regulation 3(1))
- maintain a record of the use to which any public funds made available to it are put. (Regulation 3(4))
- retain the records of any public funds made available to it for a period of five years starting on the last day of (i) the financial year in which those funds were made available or (ii) the financial year in which those funds were last put to use, whichever is the later; (Regulation 4(1))

- retain the record of the use to which any public funds made available to it were put for a period of five years starting on the last day of the financial year in which those funds were last put to use. (Regulation 4(2))
- within 28 days of receipt of a written request by the Secretary of State, provide the Secretary of State with (i) the information requested concerning those records, (ii) copies of those records, if so requested, and (iii) such further information as the Secretary of State considers necessary to fulfil the United Kingdom's obligations under the Directive. (Regulation 5)

Note: It may be that in a particular financial year, public funds are made available to your organisation or your organisation puts to use public funds that have been made available to it, but not both in the same financial year. In that event, sub-paragraph (a) above or sub-paragraph (b) above will apply, as appropriate.

24. Article 5.3 of the Directive requires Member States, where the Commission considers it necessary so to request, to supply to it not only information concerning the records that public undertakings must maintain and retain but also "any necessary background information, notably the objectives pursued".

### Undertakings that are granted an exclusive right or a special right or are entrusted with a service of general economic interest

25. An undertaking (i) that is granted an exclusive right or a special right and which carries out another activity or (ii) that is entrusted with an SGEI, receives public service compensation in relation to that service and carries out another activity, being an undertaking to which the Regulations apply, must:
- maintain separate accounts for its activities under the exclusive or special right or SGEI and for its other activities. Those separate accounts must (i) show the respective costs and revenues associated with the different activities, (ii) show the methods by which costs and revenues are assigned to the different activities, and (iii) be based on clearly established, consistently applied and objectively justifiable cost accounting principles. (Regulation 6(1) to 6(2))
  - retain those separate accounts for a period of five years starting on the last day of the financial year to which those accounts relate. (Regulation 7)
  - within 28 days of receipt of a written request by the Secretary of State, provide the Secretary of State with (i) the information requested concerning those separate accounts, (ii) copies of those separate accounts, if so requested, and (iii) such further information as the Secretary of State considers necessary to fulfil the United Kingdom's obligations under the Directive and requests. (Regulation 8)
26. **Separate accounts** have been held to involve the adoption of "an accounting system with separate accounts designed to allow...in particular, verification that there are neither cross subsidies between reserved and non-reserved services, nor discriminatory practices". The Regulations require the maintenance and retention of records: they do not require the preparation or publication of the separate accounts, though this may represent good practice or be required by other legislation.



## Public undertakings operating in the manufacturing sector

27. A public undertaking operating in the manufacturing sector with a turnover in the previous financial year of more than €250 million must provide to the Secretary of State:
- a copy of its annual report and accounts;
  - a copy of any notices of shareholder meetings relating to that financial year;
  - specified information insofar as it is not included in the annual report and annual accounts including information concerning the provision of any share capital by a public authority or otherwise, the award to it of any non-refundable grants, the award to it of any loans specifying interest rates, terms and security, any guarantees given to it by a public authority in respect of loan finance, any dividends paid out and profits retained, and any other financial advantage provided by a public authority;
- within 10 working days of the publication (if any) of the annual report or eight months following the end of the undertaking's financial year, whichever is the earlier. (Regulation 9)
28. A public undertaking operating in the manufacturing sector with a turnover in the previous financial year of more than €250 million must, within 28 days of a written request by the Secretary of State, provide the Secretary of State with such further information as the Secretary of State requests and considers necessary to fulfil the United Kingdom's obligations under the Directive. (Regulation 9(5))
29. In some circumstances information may be provided in consolidated form. (Regulation 10)
30. These obligations are complex: their detailed application is best-addressed case by case, in consultation with the BIS State Aid Team.

## Contract terms

31. The regulations cover any contract linking a public authority to a public undertaking in respect of compensation (ie. aid in any form whatsoever including grant or support in accordance with Article 107 TFEU) or to an undertaking which is granted a special or an exclusive right or is entrusted with an SGEI and receives public service compensation in relation to that service.
32. Public authorities shall ensure that the elements of the appropriate Regulations are contained as terms in such contracts.
33. Irrespective of the requirement set out in paragraph 30, in any contract between a public authority and a public undertaking covered by the Regulations, the elements of the appropriate Regulations will be included as implied terms in those contracts. If a public undertaking fails to comply with those implied terms they will be liable for breach of contract.

## Services of general economic interest (SGEI)

34. The EU Treaty does not define a SGEI – it is for Member States to define, with the Commission and Court only having a role in cases of manifest error. The Commission has identified transport networks, energy and communications (posts, telecommunications, broadcasting) as sectors tending to be regarded, as SGEIs, but SGEIs are by no means limited to these sectors. However, broadly speaking the classification as SGEIs normally applies to services:
- the provision of which is generally entrusted to public or private operators rather than being entrusted by statute to all undertakings in a given sector of the economy;
  - which are intended to meet the general needs of the populace, notably in the case of public services, and do not benefit a specific category of user.
35. It is also clear that an undertaking must have been formally “entrusted” with an SGEI through an act of a public authority (which can be primary or secondary legislation, a contract or Ministerial Instruction); a degree of general or specific supervision by a public authority is not sufficient.
36. For the obligations in Regulation 6 (i.e. requirement to maintain separate accounts) to apply to an the undertaking entrusted with an SGEI, that undertaking must, amongst other things, also receive public service compensation in relation to the service. This is to enable the Commission to verify that there has been no over compensation. The Directive will catch all compensation for an SGEI regardless of its aid status. Public service compensation means any financial support that is granted by the State or through state resources to an undertaking entrusted with the operation of a SGEI and is designed to cover costs, some or all of the costs associated with the specific obligations imposed on the undertaking.
37. The obligations in Regulation 6 apply to any undertaking that is required to maintain separate accounts, i.e. undertakings that are granted a special/exclusive right or entrusted with an SGEI (for which it receives public service compensation in relation to that service and which is a state aid) and “also carries on any other activity” (see Regulation 2). Neither the Regulations nor the Directive define “any other activity”. The obligation to maintain separate accounts applies whether the other activities are economic or not because the purpose of the Directive is to identify the costs and revenues attributable to the SGEI/ special or exclusive right from those of any other activities which the undertaking carries out, whatever their nature, so that (not least) the undertaking’s competitors can know how much public compensation it is receiving for the functions it carries out.
38. To sum up, an organisation falls within this category if it is an entity that offers goods or services in a market and that either it:
- is granted an exclusive right; or
  - is granted a special right otherwise than in accordance with objective, proportional and non-discriminatory criteria; or
  - is entrusted with an SGEI and receives public service compensation, regardless of aid status, in relation to that service; and



- also carries out another activity  
irrespective of whether it is a public or a private undertaking.

39. Further information about SGEI is at Annex E

### Exemptions from the regulations – public undertakings

40. Regulation 3(5) provides that the obligations imposed by the Regulations on public undertakings do not apply:

- where a public authority makes public funds available to another public authority
- in relation to any public funds received by a public undertaking in relation to services supplied by a public undertaking which are not liable to affect trade between Member States within the meaning of the Treaty to an appreciable extent
- to the Bank of England
- to deposits of public funds placed with a public credit institution by a public authority on normal commercial terms
- to a public undertaking, other than a public credit institution:
  - whose total annual net turnover is less than €40 million in each of the two financial years preceding that in which public funds are made available to it, as regards obligations relating to such funds being made available to it; or
  - whose total annual net turnover is less than €40 million in each of the two financial years preceding that in which public funds are last used by it, as regards obligations relating to such funds being used by it.
- a public credit institution:
  - whose balance sheet total is less than €800 million in each of the two financial years preceding that in which public funds are made available to it, as regards obligations relating to such funds being made available to it; or
  - whose balance sheet total is less than €800 million at the end of each of the two financial years preceding that in which public funds are last used by it, as regards obligations relating to such funds being used by it.

41. Note: the €40 million/ €800 million threshold may exempt an organisation in some financial years, but not in others. This may make it necessary to check each year whether the Regulations apply. Unless these exemptions take all of the activities of your organisation outside the provisions of the Regulations relating to public undertakings (at least for the current financial year), go to paragraphs 4.1 to 4.3 for the obligations that the Regulations impose on your organisation.

42. Regulation 3(2) provides that:

- setting-off operating losses;
  - providing capital;
  - providing non-refundable grants or loans on privileged terms;
  - granting financial advantages by forgoing profits or recovery of sums due;
  - forgoing a normal return on public funds unused by the public undertaking; or
  - granting compensation for financial burdens imposed by the public authority
- are to be regarded as **providing public funds**. “Setting-off operating losses” would seem to refer to situations in which a public undertaking is compensated for losses of a general nature (in view of the lack of guidance from the Commission on this point, any problems arising from this issue should be referred to the contact official).

43. Community jurisprudence in the context of State aid suggests that **to define to an appreciable extent**:

“it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that they may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States. Moreover, that effect must not be insignificant”.

44. In practice, the effect of this exclusion is not as wide as it may seem, as there are very few activities, beyond the purely local, that can be judged not to have some potential effect on intra-community trade.

45. A **public credit institution** is not defined. However a credit institution has long been defined elsewhere as:

“an undertaking whose business is to receive deposits and other repayable funds from the public and to grant credits for its own account”.

Public credit institutions are very popular on the Continent, particularly Germany. However, there are very few, if any, examples of public credit institutions operating in the UK.

46. **Balance sheet total** has been defined elsewhere as comprising unpaid subscribed capital, formation expenses, fixed assets, current assets, and prepayments and accrued income.

### Exemptions from the regulations – undertakings with an exclusive or special right or are entrusted with a SGEI

47. Regulation 6(3) provides that the obligations imposed by the Regulations on undertakings that are granted an exclusive right or special right or are entrusted with an SGEI do not apply to:

- activities in respect of which other provisions in relation to financial transparency within undertakings have been laid down by the Communities.

- services supplied by an undertaking that are not liable to affect trade between Member States to an appreciable extent.
  - an undertaking, other than a public credit institution:
    - whose total annual net turnover is less than €40 million in each of the two financial years preceding that in which public funds are made available to it, as regards obligations relating to such funds being made available to it; or
    - whose total annual net turnover is less than €40 million in each of the two financial years preceding that in which public funds are last used by it, as regards obligations relating to such funds being used by it.
  - a public credit institution:
    - whose balance sheet total is less than €800 million at the end of each of the two financial years preceding that in which public funds are made available to it, as regards obligations relating to such funds being made available to it; or
    - whose balance sheet total is less than €800 million at the end of each of the two financial years preceding that in which public funds are last used by it, as regards obligations relating to such funds being used by it.
  - an undertaking which is entrusted with the operation of a SGEI pursuant to Article 86(2) of the Treaty if the compensation it receives was fixed following an open, transparent and non-discriminatory procedure.
48. Note: An organisation may be exempted by the €40 million/ €800 million threshold in some financial years, but not in others. This may make it necessary to check each year to assess whether the Regulations apply. Unless these exemptions take all of the activities of your organisation outside the provisions of the Regulations relating to undertakings that are granted an exclusive right or a special right or are entrusted with an SGEI (at least for the current financial year), go to paragraphs 4.4 to 4.8 for the obligations that the Regulations impose on your organisation.
49. In terms of **activities in respect of which other provisions in relation to financial transparency within undertakings have been laid down by the Communities**, examples include rail, road and inland waterway transport; the supply of electricity; ground-handling activities at airports and the supply of natural gas.

### Exemptions to the regulations – public undertakings operating in the manufacturing sector

50. Regulation 9(6) provides that the obligations imposed by the Regulations do not apply to public undertakings in the manufacturing sector with a turnover in the previous financial year of €250 million or less.

51. Unless this exemption takes your organisation outside the provisions of the Regulations relating to public undertakings in the manufacturing sector, go to paragraphs 4.9 to 4.13 for the obligations that the Regulations impose on your organisation.

### Obligations – public undertakings

- 4.1 A public undertaking to which the Regulations apply must:

- maintain records of any public funds which are made available to it either (i) directly by a public authority, or (ii) by a public authority through another public undertaking or financial institution. (Regulation 3(1))
- maintain a record of the use to which any public funds made available to it are put. (Regulation 3(4))
- retain the records of any public funds made available to it for a period of five years starting on the last day of (i) the financial year in which those funds were made available or (ii) the financial year in which those funds were last put to use, whichever is the later; (Regulation 4(1))
- retain the record of the use to which any public funds made available to it were put for a period of five years starting on the last day of the financial year in which those funds were last put to use. (Regulation 4(2))
- within 28 days of receipt of a written request by the Secretary of State, provide the Secretary of State with (i) the information requested concerning those records, (ii) copies of those records, if so requested, and (iii) such further information as the Secretary of State considers necessary to fulfil the United Kingdom's obligations under the Directive. (Regulation 5)

Note: It may be that in a particular financial year, public funds are made available to your organisation or your organisation puts to use public funds that have been made available to it, but not both in the same financial year. In that event, sub-paragraph (a) above or sub-paragraph (b) above will apply, as appropriate.

52. Article 5.3 of the Directive requires Member States, where the Commission considers it necessary so to request, to supply to it not only information concerning the records that public undertakings must maintain and retain but also “any necessary background information, notably the objectives pursued”.

### Obligations – undertakings that are granted an exclusive right or a special right or are entrusted with a service of general economic interest

53. An undertaking (i) that is granted an exclusive right or a special right and which carries out another activity or (ii) that is entrusted with an SGEI, receives public service compensation in relation to that service and carries out another activity, being an undertaking to which the Regulations apply, must:
- maintain separate accounts for its activities under the exclusive or special right or SGEI and for its other activities. Those separate accounts must (i) show the respective costs and revenues associated with the different activities, (ii) show the methods by which costs and revenues are assigned to the different activities, and

(iii) be based on clearly established, consistently applied and objectively justifiable cost accounting principles. (Regulation 6(1) to 6(2))

- retain those separate accounts for a period of five years starting on the last day of the financial year to which those accounts relate. (Regulation 7)
- within 28 days of receipt of a written request by the Secretary of State, provide the Secretary of State with (i) the information requested concerning those separate accounts, (ii) copies of those separate accounts, if so requested, and (iii) such further information as the Secretary of State considers necessary to fulfil the United Kingdom's obligations under the Directive and requests. (Regulation 8)

54. **Separate accounts** have been held to involve the adoption of “an accounting system with separate accounts designed to allow...in particular, verification that there are neither cross subsidies between reserved and non-reserved services, nor discriminatory practices”. The Regulations require the maintenance and retention of records: they do not require the preparation or publication of the separate accounts, though this may represent good practice or be required by other legislation.

### Obligations – public undertakings operating in the manufacturing sector

55. A public undertaking operating in the manufacturing sector with a turnover in the previous financial year of more than €250 million must provide to the Secretary of State:

- a copy of its annual report and accounts;
- a copy of any notices of shareholder meetings relating to that financial year;
- specified information insofar as it is not included in the annual report and annual accounts;

within 10 working days of the publication (if any) of the annual report or eight months following the end of the undertaking's financial year, whichever is the earlier. (Regulation 9)

56. A public undertaking operating in the manufacturing sector with a turnover in the previous financial year of more than €250 million must, within 28 days of a written request by the Secretary of State, provide the Secretary of State with such further information as the Secretary of State requests and considers necessary to fulfil the United Kingdom's obligations under the Directive. (Regulation 9(5))

57. In some circumstances information may be provided in consolidated form. (Regulation 10)

58. These obligations are complex: their detailed application is best-addressed case by case, in consultation with the BIS State Aid Team.

### Contract terms

59. Public authorities shall ensure that the elements of the appropriate Regulations are contained as terms in contracts covered by the Regulations.

60. Irrespective of the requirement set out in paragraph 5.1, in any contract between a public authority and a public undertaking covered by the Regulations, the elements of the appropriate Regulations will be included as implied terms in those contracts. If a public undertaking fails to comply with those implied terms they will be liable for breach of contract.

Withdrawn

# Annex D – Guidance for universities and research organisations on the Framework for Research and Development and Innovation

1. Because State aid is designed to regulate competitive market activity it does not generally impact upon public functions such as fundamental research or tertiary education. But where Universities become active in the placing of goods or services on a competitive market they need to understand and take account of State aid rules.
2. The Commission's Research and Development and Innovation (R&D&I) State aid framework provides some guidance on where it thinks Universities can operate without giving rise to State aid at all. It then goes on to explain when R&D&I which is State aid can be compatible with the Treaty (i.e. approvable) where the activity leads to additional R&D&I and where the distortion of competition is not considered to be contrary to the common EU interest. The framework sets out the conditions under which R&D&I aid may be compatible with the Treaty, including projects involving universities and research organisations.
3. The Framework defines a Research Organisation (RO) as an entity, such as a university or research institute, irrespective of its legal status, whose primary goal is to conduct research and disseminate its results by way of teaching, publication or technology transfer. All profits must be reinvested in these activities and shareholders or members shall have no preferential access to the research capacities or to research results generated.
4. Whether RO activities involve state aid will hinge on whether they are acting as an undertaking involved in an economic activity offering goods or services in a given market. The R&D&I framework divides RO activities into economic and non economic activities and sets out circumstances in which they may or may not be considered to involve aid.
5. In considering whether an activity entails State aid it is necessary to consider whether there is aid to a) the RO or one of its subsidiary or associated bodies b) end users (businesses).

## Non economic activities

6. Non-economic activities are those where the RO is performing a public function and is not placing goods or a service on a market. For there to be a "market" there must be an element of competitive supply, but this does not include academic competition. Universities compete fiercely for prestige and academic and research excellence but that does not create a market by itself. For a market to exist there has to be an



element of economic competition – competition to make money, where success will damage the business of a rival.

7. Non-economic activities will therefore include:

- Public financing of the primary activities of a RO including tertiary education, independent R&D and the dissemination of research results. The fact that Universities charge tuition fees does not change the fundamentally non-economic nature of their education remit.
- Technology transfer activities carried out by ROs, including licensing, spin-off creation, or other forms of management of knowledge created by ROs, provided they are of an internal nature and where all income generated is reinvested in the primary activities of the RO (“internal nature” is defined as a situation where the management of knowledge is conducted by the RO or a subsidiary or contracted to a third party on a commercial basis).
- Development of land and property for the University’s own use. This would cover teaching and research facilities including those which may eventually be used for joint research with private industry or for the supply of commercial services to industry, as long as these purposes are ancillary to the main public functions.

## Economic Activities

8. Economic activities are all those consisting of the placing of goods and services on a competitive market. This would include:

- the development (building) of land and property mainly for use by commercial organisations (which includes spin-out companies), including science parks, laboratories for rent and business incubation centres.
- the renting out of infrastructure to commercial organisations, including payments for use of University research and conference facilities as well as payments for use of commercially designated land and buildings (i.e. in science parks or business incubators)
- the provision of consultancy services to business or to Government
- the provision of certification and testing services on a commercial basis e.g. to business
- the provision of contract research services.

9. Where activities are “economic” there may be State aid present, but there is still a requirement for competition to be distorted and for an impact on intra Community trade. These tests are usually easily met, but there are some instances where they may not be met and where there will be no state aid. For example:

- where the RO is contracting with commercial organisations at a market price and there is no alternative commercial supplier of the services in question in the area. This would be the case for some incubation and contract research where, for example, the market is a local one (businesses will not travel far to be incubated and University spin offs will be particularly immobile). It can be tricky to ensure that



a market price is being charged in these scenarios where there is no real commercial benchmark, but if aid is detected it could be argued it flows through to the recipient businesses rather than constituting aid at the level of the RO itself.

- where the RO is fulfilling a public contract which was let by competitive tender. In this scenario the RO is being paid a market price for the delivery of commercial services and there is no element of subsidy arising from the payments for these services. There would risk being a being State aid problem, however, if an RO was to cross subsidise such consultancy services using its core funding. Any fees quoted for such work should therefore include full recovery of costs.

## How to avoid giving state aid to others

10. ROs must not only consider whether their own “economic” activities might distort competition on service markets, they must also be careful not to use their own state funded status to offer direct or indirect State aid to others. In fact in practice the European Commission is likely to be more interested in how Universities might channel state funding to big business than in minor distortion of property or consultancy service markets.
11. The basic principle is that ROs must deal with commercial organisations equally and on a fully commercial basis. Otherwise State aid may flow through the RO to the business.

## Joint research projects

12. The R&D&I Framework states that there will be no aid to the industrial partner/end user or the RO if one of the following conditions is met:
  - The undertaking(s) bears the full cost of the project; or
  - The results are widely disseminated and IP rights allocated to the RO; or
  - The RO receives compensation at market price for the IP rights which result from the activity of the RO and which are transferred to the participating undertakings: or
  - Where there is a contractual agreement between partners under which IP rights and access rights to results are allocated to the partners in a way which reflects their interests, work packages and financial contributions to the project.
13. If the conditions above are not met the Commission will consider the contribution of the RO to the research project to be aid to the undertakings (businesses).
14. Some of the other scenarios where ROs might be accused of forwarding aid to businesses might be as follows:
  - Where the RO builds a new research facility in partnership with a business, which then secures preferential rights of usage in return. The terms of the collaboration need not necessarily result in State aid flowing through to the business but the more complex, long term and exclusive the partnership and the smaller the field of such potential strategic partners, the greater the risk that the deal will be seen as advantageous to the business, rather than purely commercial. ROs seeking such

partnerships should advertise the opportunity widely and ensure that the choice of partner complies with EU public procurement norms to reduce risk. If, in practice only one company has the resources, technical expertise and geographical proximity to become the strategic partner, the RO must be very careful to ensure that the terms of the deal are fully commercial as they will not be tested by market competition. To reduce risk it would be prudent to employ independent consultants to verify appropriate terms.

- Where the RO builds an incubation centre in a locality where none existed before and rents it out at a loss (not recovering full costs of investment plus operating costs), it may be setting the prices for rents and consultancy services at the level the market can bear but this is not a commercial rate. The market would not have supplied the facility at all, so there is an element of State aid here, probably at the level of the users of the incubation centre; however it may be arguable that there is no impact on intra-community trade depending on whether the Centre will in practice affect the provision of other business services in the relevant geographic area.
- Where the RO provides support to its own spin-out companies after they have spun-out. As stated above, knowledge management activities on the part of the RO, including licensing, feasibility studies, market assessments prior to launch and even initial funding of spin-outs is not an economic activity as far as the RO is concerned because as yet there is no business receiving an advantage. However, once the spin-out is formed, it will be a business and the terms on which it and its staff interact with the RO must be arms length and fully commercial in order not to contain State aid.

Withdrawal

# Annex E - A risk-based approach to State aid

## Summary

In deciding whether to take a non-aid approach or to seek the legal certainty provided by a state aid notification and approval, aid givers will need to first weigh up the strength of the argument that the measure is not aid and second, the likelihood of legal challenge or of the Commission finding out (if the state aid verdict is unclear). The final thing to bear in mind is what the consequences of such a decision would be and, directly linked to this, how difficult it would be to rectify the situation.

An early discussion with departmental State aid experts, if they exist, or the State aid team in BIS can often allay concerns or highlight points that need further consideration. Each case is different and as this is a particularly specialised area, it is important to seek expert advice where there is doubt as to the status of the measure. Seeking this at an early stage can prevent longer delays further down the line.

The following questions are the ones to ask and answer when making decisions about state aid risk.

- How significant is the assistance in terms of its relative size and impact?
- What is the extent to which the aid would affect intra-community trade?
- Is there a risk of a serious distortion of competition (or suspicion of one)?
- What is the extent of competition in the sectors concerned?
- How firm is the assessment and evidence that the measure is not or compliant aid?
- Which sectors does the aid apply to – does it include sensitive sectors and/or is there previous history amongst competitors and within the sectors concerned, which are more likely to trigger complaints?
- What are the policy reasons for implementing quickly rather than waiting for a notification to be approved?
- Would not notifying the measure introduce uncertainty for recipients which would make it less likely to have the desired effect?
- What impact would an adverse finding have on companies which had already received aid?
- How easy would it be to recover the aid if an investigation found it to be an illegal state aid?

- What would be the wider implications for the credibility or delivery of the policy or its objectives if there was a negative decision, scheme was suspended or if aid had to be recovered?

## Striking the right balance

Making a proper assessment of state aid issues is an important and frequent aspect of policy-making right across government. Failing to take proper account of the State aid rules and risk can have major implications for the delivery of government policy objectives. Such a failure could ultimately prevent, a scheme from being implemented, cause damage to the overall objectives of the policy or, in the worst case, leads to funds paid under a scheme to be recovered. However, an overly-cautious approach to State aid can lead to unnecessary delays in policies being implemented or can lead to sub-optimal policy-making. It is therefore important that proper consideration of State aid issues is given to policies before they are implemented.

In general, State aid can only be given legally if it falls within one of the existing mechanisms described in Chapter 1, figure 2. A large proportion of the assistance schemes currently underway in the UK use one of the exemptions – *de minimis* or GBER. The larger schemes have often been approved by the Commission in advance of the aid being given. However it is not always clear, even with experience, whether a given measure is a state aid and, if so, how it should be treated under the rules. There may be a lack of state aid precedents in a particular policy area or even contradictory precedents and there can often be conflicting legal advice on whether a measure is an aid. Perhaps because of the potential severity of the implications for getting state aid decisions wrong, it is often easy to seek comfort by adopting a very cautious stance towards state aids. However, this in itself can be unnecessary, and lead to the delay, or even failure to implement policies that will contribute to public bodies achieving their objectives.

Government ministers have made it clear they want to take a “risk-based” approach to decision-making, which both respects our legal obligations and focuses on target delivery. This means state aid decisions should be based on what is ‘credible’ rather than necessarily what is ‘cast-iron’. However, decision-makers are responsible for ensuring that they understand and consider the impact and probability of state aid risk involved and, in particular, the extent to which any risk would be borne by business instead of or in addition to government and ensure that the level of risk is one which business as well as government can live with and that ministers are properly advised on this.

This section of the guide outlines a risk-based approach to decision-making in state aid cases.<sup>44</sup> It is designed to help all those involved at every stage of the process from planning a measure to its actual implementation, and it applies to aid givers in all levels of government, national and local. However, it does not – and cannot – provide a blueprint for every decision and risk should be assessed in consultation with the state aid team.

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<sup>44</sup> Based on: DTI and HM Treasury (2004) *Taking account of state aid issues in policy-making: a risk-based approach*

## Uncertainty about whether assistance is state aid can pose risks

Risk can be defined as the possibility of being exposed to danger or difficulty. A risk assessment therefore needs to include both a quantification of how likely an event happening is and what the impact would be if it did. This purpose of this is to inform what the appropriate handling response should be.

The impact of any un-notified measure being later found by the Commission to be incompatible State aid is fairly uniform – suspension and removal of the scheme and possible recovery of any aid already given with interest. This does not mean, however, that all measures that are potentially State aid require handling in the same way. It is also necessary to consider the probability that introducing a measure without Commission approval will prompt complaint or a Commission enquiry, and if this could lead to a Commission investigation into the measure.

The credibility of the argument that a measure is not aid will depend largely on how much there is by way of supporting precedent from other cases, and consistency with the Commission's state aid policy as set out in its various communications. If there is a credible argument that the measure is not aid, the likelihood of Commission or third party action will also influence the decision whether to seek the certainty of a formal notification. This in turn will depend, amongst other things, on, the sector involved, the location of the aid recipient and whether there is an aggrieved competitor.

The State aid rules are concerned primarily with the effect on competition and trade, not the form of a measure, nor the intention behind it. The fact that a given measure may deliver strong benefits for a particular region or sector, environmental or other policy objectives is unlikely to be sufficient if this is at the expense of significant harm to competitors in other Member States.

A State aid will only exist if the assistance meets all of the four criteria [See Chapter 1- Is it State aid?](#), [Annex A](#) and [the State aid basics guide](#). Whether a measure meets a criterion is not always clear so it may be very difficult to conclude that a measure is definitely not a State aid but it may be possible to construct a credible argument that a measure does not constitute aid.

### The ease of gaining approval affects how cases should be handled

The four tests or criteria are used to assess the extent to which something might be considered a State aid. But while the question of whether or not a measure constitutes a state aid is the primary consideration, other factors will need to be considered when it is not certain that a measure is not state aid. For example, two different measures may both be credibly argued not to constitute state aid but if one is clearly approvable even if it were found to be an aid because it is clearly compatible with the internal market, and the other not, then this would result in different risk level and prompt a different handling approach.

### The likelihood of challenge should be taken into account

Where introducing a measure, it is also important to consider the likelihood of a state aid challenge. An aggrieved competitor or citizen may make a complaint to either a national court or free of charge direct to the Commission or the Commission may be prompted by a member state's policy announcements or proactively monitor areas of particular interest.

The factors that will determine whether a third party or the Commission itself feels inclined to make and pursue enquiries about the legitimacy of a measure will include the size of the benefit, the extent to which the measure could be judged to distort trade and competition, whether the aid is available to firms in sensitive sectors, and the intensity of competition in the sector.

## The types of risk involved in giving assistance that may be state aid

### Financial

The Commission has the power to seek recovery of any payment of impermissible aid; this extends back for ten years. This financial risk is, of course, borne by the companies receiving any money. Illegal aid has to be repaid with interest regardless of the effect on the recipient – even if a company is forced into bankruptcy. Even comparatively small amounts of money could have an unfortunate effect on companies if they had to be reclaimed – firms may have entered into contracts on the basis of receiving government assistance which still have to be honoured even if the aid is later withdrawn. Consequently firms can be keen to see the state aid status of financial assistance clarified before accepting the monies. So if a proper state aid assessment is not undertaken, firms may be unwilling to make use of the scheme, rendering it ineffective.

The fact that it may be administratively difficult or expensive for the state to reclaim any aid is also not a sufficient reason to avoid recovery. The one reason why the Commission might not require recovery of an impermissible aid is if it would breach the principle of legitimate expectations – in short, if a diligent business had grounds for believing the assistance it received was state aid-compliant. If the Commission has been aware of the award of an aid and has given the impression that it would not object to the aid, for example by unduly delaying taking steps to recover it, then there would be strong grounds for arguing recovery of aid granted subsequently is not appropriate. (The fact that a policy has been publicly announced is not sufficient to argue this, there needs to have been some public signal on the part of the Commission of which businesses would be aware.) For example, if the UK copied exactly a scheme which had been cleared as non-aid for another member state but the Commission subsequently changed its mind both on the original scheme and our scheme then we would have grounds to argue legitimate expectation. This is what happened in the case of French and Irish co-ordination centres which had copied the example in Belgium which had originally been cleared as non-aid.

Departments are also at some financial risk as a complainant could win damages against them in the UK courts if they could prove that they had been harmed by the award of un-notified aid to a competitor. But adopting an over-cautious approach can also have financial implications. Obviously, waiting for Commission clearance for a scheme will delay the distribution of the assistance. In more extreme cases, not paying rescue aid before Commission clearance could put a company into liquidation so aid will have to be paid even before it has been approved by the Commission. A delay in paying any aid whilst waiting for approval could also have an effect on the company's balance sheet.

### Delivery and reputational



A decision not to notify a measure carries significant risk to the overall delivery of policy objectives if it is later found to be incompatible. Ministers can expect a tough time from a Select Committee if this has resulted in a company having to repay aid. More importantly, a Minister could be brought to court on a charge of misfeasance in public office if he/she knowingly allows aid to be paid which they know not to be legal. If a Minister insists that an un-notified state aid be given then he/she will need to seek approval from the Ministerial Sub-Committee on European Issues (EP) and then issue a Ministerial Direction to the Accounting Officer.

Giving unnotified aid could also be damaging in terms of our reputation with the Commission and might colour their view of future UK schemes and notifications.

## **These risks should be proactively managed**

### **Get advice**

The best way to manage state aid risks is to consider these factors at an early stage. Aid givers need to consider the state aid potential as a scheme's aims and conditions are being drafted, particularly as the Commission can interpret the four criteria differently depending on the circumstances. The case law of the European Court will also directly affect the way that the Commission assesses cases and this can change.

An early discussion with Departmental state aid experts, if they exist, or the state aid team in BIS can often allay concerns or highlight points that need further consideration. As this is a particularly specialised area, it is important to seek expert advice where there is doubt as to the status of the measure. Seeking this at an early stage can prevent longer delays further down the line.

### **Informal advice from the Commission**

If felt necessary an informal opinion from the Commission can be sought, usually in a discussion in Brussels or over the phone. This is off the record and the Commission cannot be bound by anything they say. It can be useful to get the broad thrust of their thinking, however, and to raise awareness of any potential obstacles, although it does not give the legal certainty of a formal notification. If you think that it would be useful to have such a meeting you should first seek advice from the BIS state aid team and UKREP.

### **Advising ministers**

Any advice to ministers and SROs must be honest and give a balanced view. If there is doubt about the legality of a measure it is important to set out the arguments and the balance of risks. Ministers can only be advised on a particular course of action if there is a reasonable argument for it being consistent with the state aid rules.

# Glossary

Term	Description
<b>Aid</b>	Short for State aid
<b>EC</b>	European Community
<b>Eligible cost</b>	Aid for initial investment can be calculated as a percentage of the investment cost in tangible or intangible assets or as a percentage of the wage-cost of the jobs linked to the initial investment.
<b>EU</b>	European Union
<b>European Union</b>	An evolution from the European Community
<b>General Measure</b>	A benefit which is available to all businesses / economic activities in the State - and is therefore not State aid according to the tests in Article 107(1). Please see <a href="#">Chapter 3</a>
<b>GGE</b>	Gross grant equivalent that is, the value of an aid measure (before tax).
<b>Incentive effect</b>	The Aid should be an incentive for an entity to do something that is innovative thus giving State aid to companies in difficulty (different rules apply)
<b>Member State</b>	A nation state member of the EU
<b>NGE</b>	Net grant equivalent that is the value of an aid measure (after tax)
<b>“No aid” or “Not aid”</b>	Not State aid as specified in the Treaty on the functioning of the European Union (TFEU) Article 107(1). This means the State aid rules do not apply.
<b>Notification</b>	Process of providing information to the Commission about Aid you wish to give and for which you are seeking their approval. Notification may also refer to the documents submitted to the Commission as part of this notification process.
<b>Public authorities</b>	Organisations with the power to allocate public funds including but not necessarily Government Departments.
<b>SANI</b>	The IT software used to notify state aid to the European Commission.



<b>Term</b>	<b>Description</b>
<b>State aid</b>	Aid as defined by the Treaty on the functioning of the European Union (TFEU) Article 107(1). It must be granted through state resources in any form which could distort competition and affect trade by favouring certain undertakings or the production of certain goods is incompatible with the common market unless the Treaty (TFEU) allows otherwise.
<b>State aid rules or regime</b>	The broad set of rules that apply to State aid – set out in Article 107 to 109 of the Treaty on the Functioning of the European Union, European Commission legal regulations, guidelines, frameworks, notices, directives, communications, and in interpretations of the rules by the European Court of Justice.
<b>State resources</b>	It has a broad meaning; any measure which is attributable to the state and which has an impact of the state's budget. Surprising examples of state resources include national lottery funding and some European funding where this is directed by the Member State. See chapter 1.

Withdrawal



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