

State Aid - Frequently Asked Questions

Note: these are intended to help, but they cannot cover all possible situations and you should seek advice from State Aid Branch or equivalent in individual cases.

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Basic queries:

Q. What is a State aid?

- A.** It is aid from a Member State to business which the Treaty of Rome declares generally incompatible with the common market - with certain possible exceptions. Broadly, it means a Member State's financial aid which favours selected businesses and has the potential to distort competition and affect trade between EU Member States:

Article 87(1) EC states: "Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market"

However in certain circumstances the Commission may be able to approve a State aid on compatibility with the Treaty.

Q. What is an undertaking?

- A.** An undertaking is an entity which is engaged in commercial activity. This means that it puts goods or services on a given market. The important thing is what the entity does, not its status. Thus a charity, a not for profit company or a Government Department can all be undertakings if they are involved in commercial activities.

Q. What are the governing rules of State aid? Where can I find them?

- A.** The principal legislation is Articles 87 to 89 of the EC Treaty as updated. Article 36 ex 42 agriculture; Article 73 – ex 77 transport; Article 86(2) SGEI (Services of General Economic Interest); Articles 4c and 95 ECSC European Coal and Steel Community.

The rules and their interpretation are developed by ECJ case law and Commission secondary legislation – Frameworks, Directives, Communications and Guidelines on how the Treaty articles apply to different *forms* of aid e.g. fiscal measures, and to different *purposes* for which aid is given. Some rules affect particular sectors e.g. there are special rules covering motor vehicles, shipbuilding, steel. Some rules cover aid for "horizontal" objectives *i.e. not sectorally specific*. Examples are aid for R&D, aid for SMEs, aid for training. The sectoral rules take precedence over the horizontal ones – they add restrictions¹.

¹ For reference, see: **the European Commission's website**
http://ec.europa.eu/comm/competition/state_aid/overview/index_en.html

Q. How do I spot a State aid?

A. Article 87(1) sets out criteria, all of which must be met for a State aid to be present.

- The aid favours certain undertakings or the production of certain goods,
- The aid is provided through State resources,
- The aid distorts or threatens to distort competition,
- The aid affects trade between Member States.

If it is absolutely certain one or more than one of these conditions is not met, you are not dealing with a State aid.

Some basic myths to dispel:

Public funding and State aid are not one and the same, i.e. public funding is not necessarily a State aid. There being public funding is **not enough** to determine that this funding is a State aid.

The beneficiary can be public or private or a Public Private Partnership (PPP). For a State aid to exist, there has to be a **benefit** from **State resources** to an **economic entity** which is active in an **activity traded within the EU**. The entity need not itself carry out trade between Member States. The issue is whether the **activity** it is engaged in, is traded between Member States, e.g. insurance; construction; banking. There are few activities which are not traded between Member States these days and which do not **affect competition**. If the entity does not carry out an economic activity, there is no State aid as far as these rules are concerned.

Q. Why must we comply with the State aid rules? Why bother?

A. Unauthorised State aid is **illegal**. These are the consequences for giving such aid:

- aid payments can be suspended
- firms may have to repay the State with interest
- policies may have to be altered
- legislation may need to be amended
- HMG and recipients could be sued by a competitor for damages

The State aid rules work to create fair competition for UK companies in Europe. Application of the rules means that competitors in other EU Member States cannot receive unlawful State subsidies which distort competition.

Q What is the logic behind the State aid rules?

A The basic reason for the existence of the State aid rules is to ensure that aid does not distort competition in the European Union. State aid is one of the few remaining ways in which Member States can hold up liberalisation and protect companies from competition. As sectors become open to competition, the State aid rules start to become more important – this includes areas which have been the subject to State monopoly. Where in years past, sectors were national in nature, they have become cross-border: coal, transport, financial services and broadcasting are examples.

High amounts of aid can of themselves be distortive. That is why the Lisbon Council Conclusions include a commitment to reduce overall levels of aid within the European Community. The rules also exist **to stop abuses of aid**. For example: Celtic Energy complained under the State aid rules that the massively subsidised German mines were using aid to undercut prices of anthracite on the UK market. The Commission investigated and found the aid had indeed distorted competition and ordered the German companies to repay the DM 20m back to the German State. The German government paid compensation to Celtic.

Q. Is State aid illegal?

A. There is a clear statement of principle under Articles 87 and 88 of the Treaty of Rome that any form of aid, whether provided directly by the State, or indirectly ‘through State resources’, is incompatible with the Common Market if it distorts or threatens to distort competition within the Community. However, not all State aid is unlawful. The Commission may, as an exception permitted by the Treaty, formally approve aid measures within certain limits (depending on the size, sector and location of the beneficiary). These "limits" are detailed in the frameworks / guidelines / regulations referred to above.

Q. What is the Commission’s role?

A. The Commission has sole competence to decide and review what constitutes a State aid. This means that the Commission has the ultimate say in all State aid matters - subject to limited review by the European Court of Justice. Accordingly, the Commission (DG COMP) has considerable powers to monitor, control, and restrict the forms and levels of aid given by Member States to their industries.

They must decide cases to a timetable set out in a Council regulation agreed unanimously. The Commission has to take a decision within 2 months of a complete notification. However in practice the timetable is longer. Allow at least 6-7 months. The Commission can start a further period of two months by asking for further information if they consider the notification is not “complete”. (The further period only starts once

the Commission receives the answers.) At the end of the final two-month period, the Commission may decide to approve, OR to open a second-stage formal investigation which adds at least another 6 months to the process – possibly significantly more.

Q. What happens if we break the State aid rules?

A. Any aid paid unlawfully is subject to recovery with interest from the date granted. Aggrieved competitors may take their complaint about (suspected) illegal State aid directly to the Commission. Aggrieved competitors may also take the recipient of unlawful aid to court in their own Member State to seek damages. The consequences for businesses if funding bodies get the State aid rules wrong can be severe. Member States are obliged to recover illegal aid if ordered to do so by the Commission even if the recovery of aid means that recipient companies go bankrupt. Companies can also take the government / granting authority to court for damages against illegal aid recovered.

Q. Can we get away with not bothering? Why is it so important to abide by the rules?

A. Ignoring the rules is **not** the right approach for critical reasons. To date in the UK almost all our notified aid cases have been approved.

The UK has increased its credibility with the Commission and benefits from goodwill when it matters. The Commission shows goodwill often by assessing our cases generally relatively quickly as they know the notifications are detailed, reasonable, thorough and by discussing elements of the cases informally can minimise delays due to the formal procedures.

Moreover, we are in a good position to use cases to develop Commission thinking. For example; the new environmental aid guidelines allow aid for cleaning up contaminated land where the polluter cannot be brought to account. This not only allows for 100% of the costs to be aided but also a profit element on top. That provision is very important and a direct result of effective UK lobbying helped by our excellent track record and corresponding credibility with the Commission.

We must still improve our own house. Yes, we have a high approval rate – so far. But too often the State aid issues are only considered at the last moment when a policy/programme structure has been agreed and Ministers already set on a policy course. State aid consideration needs to be built in right from the start.

Q. What are State Aid Branch's general recommendations on State aid?

- A.** Build State aid implications into your initial appraisal. Allow enough time for Commission clearance. Be aware of the risks of implementing unapproved aid. Try to fit any proposals to an existing approved aid or a block exemption. **Seek advice early.**

DETAILED QUERIES.

Q. What is an SGEI?

- A.** Services of General Economic Interest (SGEI) are not defined in the Treaty and it is for individual Member States to define and there is no overarching EU definition. In general, they are services which the market does not provide or does not provide to the extent or at the quality which the State desires and are in the general (i.e. of all citizens) interest and not the interest of a particular sector. SGEIs tend to include such things as gas, electricity, telecoms, public service broadcasting and public transport but this is not an exhaustive list. (See the State Aid Guide)

Q. Is support for an SGEI caught by the state aid rules?

- A.** Funding of SGEI is in principle caught by the state aid rules which apply to state funding of economic activities. Article 86(2) is the normal means of approving aid to undertakings performing an SGEI. However if the support meets the exacting tests given in the Altmark judgement (See the State Aid Guide) it will not be a state aid. These include whether there has been a tender for the aid and whether it is merely enough to cover the cost of performing the service with a reasonable profit. If it does not meet the terms of Altmark then you can either take advantage of the Block Exemption or notify the aid under the terms of the SGEI Framework. This is explained further in the section on SGEI in the State Aid Guide.

Q. What is an Article 88(2) investigation and what is the procedure?

- A.** If the Commission has doubts about the compatibility of an aid scheme which has either been notified to them or has been brought to their attention by a complainant they are obliged to open a full investigation under Article 88(2). This is a fairly lengthy procedure which can take up to 18 months in the case of notified aid and longer for unnotified aid.

The Commission will in the first instance write to the Member State outlining their doubts. The Member State will then have twenty working

days to reply. The letter is then published in the Official Journal (OJ) with any commercially commercial information removed with a short summary in all the official languages. It can take several months for letters to appear in the OJ as time is needed for translation. When the letter appears in the OJ third parties (including competitors and other Member States) can then submit comments – there is usually a one month deadline for such comments. The Member State sees all responses, although a correspondent can ask to remain anonymous. The Member State then has a further month to reply to Third Party comments. After this the Commission deliberates on all the information and may have bi-lateral meetings with the parties involved. At the end of the procedure the Commission will either decide that there is no aid involved, that the aid is compatible (possibly with conditions) or that it is incompatible. If incompatible aid has already been given this may result in the money having to be recovered. The procedure will then close (see page 3 of the State Aid Approval Process Flow Chart under the related documents).

Q. I believe that a competitor in another Member State is getting aid which strengthens their market position what can I do about it?

A. First of all you must remember that not all aid is illegal. If the aid has been notified to and approved by the Commission there is no reason why the undertaking should not benefit.

However if you consider that this aid is harming your commercial prospects then you must bring this to the attention of the Commission. The Commission is legally obliged to investigate all complaints. You should complain using the attached form (http://ec.europa.eu/community_law/plainte/form-plainte_en.pdf).

Q. What do Article 87(3)(a) and Article 87(3)(c) refer to in the SME block exemption regulation?

A. They refer to national regional aid areas ("Assisted Areas"). These may be more familiar as Tier 1 and Tier 2 areas. Tier 1 = Article 87(3)(a) areas; Tier 2 = Article 87(3)(c) areas. The Article references are to provisions in the EC Treaty which are the legal bases for approving regional aid in specific circumstances.

Q. Are Objective 1 and Objective 2 the same thing as Article 87(3)(a) and Article 87(3)(c)?

A. For Objective 1: Yes - Objective 1 areas and Tier 1/ Article 87(3)(a) are the same in the UK (note: this is not the case for the transitional Objective 1 areas). For Objective 2: caution! The Objective 2 map is larger than the Assisted Area (State aid) map therefore some Objective 2 areas will not also be in Tier 2/Article 87(3)(c) areas. If State aid is

involved in a project involving Objective 2 funding, it is the Assisted Area map that takes precedence over the Structural Funds map.

Note: the terms Objective 1 and Objective 2 only apply to projects approved before 31 December 2006. For 2007-2013 Programmes, Objective 1 has been replaced by the Convergence Objective and Objectives 2 and 3 by the Regional Competitiveness and Employment Objective. For further information, please see <http://www.dti.gov.uk/regional/european-structural-funds/page25718.html>

Q. Do the bonuses in the training aid block exemption regulation mean you can give 90% in certain cases?

A. Yes. General training for disadvantaged workers employed by SMEs in a Tier 1 / Article 87(3)(a)/ Objective 1 area.

Q. Can a firm have SME aid or Regional aid or Training aid *with de minimis* aid at the same time without raising cumulation issues?

A. Yes, provided that the de minimis aid is not given towards the same costs that are being supported under the block exemption or notified scheme if that would mean that the de minimis aid would take the recipient over the permitted aid intensity under the block exemption or notified scheme.

The total de minimis aid granted to any undertaking of any size must not exceed €200,000 over any period of three fiscal years (€100,000 for any undertakings active in the road transport sector). For cumulation purposes, only aid given under the de minimis regulation during the previous two fiscal years and the current fiscal year counts towards the ceiling. De minimis aid can be given by any public body so it is essential as part of the administrative arrangements for the de minimis regulation to ask the intended beneficiary to declare any de minimis aid from any source received in the last three years.

De minimis aid cannot be given to enterprises in road haulage operations for the acquisition of road freight transport vehicles or to enterprises in the agriculture sector (with the exception of processing and marketing of agricultural products) or for directly export-related activities. Records of aid must be kept for ten years.

Before granting de minimis aid, officials must comply with all the administrative requirements of the regulation, including ensuring the cumulation rules are observed and having a monitoring system in place.

Q. Can a firm have Regional and Training and SME State Aid at the same time?

A. Yes, provided that the aid is for different projects with distinct sets of eligible costs.

Q. Who is responsible for abiding by the de minimis threshold?

A. The provider of the aid. If you are providing de minimis aid you must first ensure that the amount will not exceed the €200,000 limit over a three-year period when added to **any other de minimis aid the intended recipient has already received from all sources** during that period. You must ask the firm concerned to provide you with information in writing about any other de minimis aid received during that period. You must also ensure that if the company is receiving aid under a notified scheme or a block exemption scheme for the same costs, the de minimis aid will not take the notified or block exempted aid over the permitted aid intensity for that particular scheme.

Q. Is it ever justified to give unnotified aid?

A. There are circumstances where this may be justified (for example, where there is uncertainty about how State aid rules will apply to a particular case) but this should only be done where the policy benefits of the aid have been clearly identified and the risks have been fully assessed - for further advice please speak to the State Aid Branch. See also joint Treasury/DTI guidance paper on a risk based approach to state aid and policy making.

Q. How are Structural Fund (SF) managers to go about ensuring compliance?

A. The first issue is to identify whether the SF itself is being used like a State aid within the meaning of Article 87(1). If yes, the issue is to identify which are the relevant aid rules - Regional aid? Training aid? R&D? - and hence what the State aid ceiling and other conditions are. Another issue is to ascertain whether there is any other public funding going towards the same project costs. If so, the manager has to ascertain whether that other public funding is notified and approved aid or block exemption aid. If not, the whole project will either have to be notified and approved before it can be used with the SF money for a State aid purpose, or comply with the terms of one of the block exemptions.

If once the **other** (non-SF) public money is approved aid, the next step comes into play. This is to ensure that **all** the public money **plus** the SF contribution is within the relevant State aid ceiling (usually the regional aid ceiling as the aid will be assistance towards an initial investment)

and meets any other relevant State aid conditions (such as special rules to certain industries, e.g. motor vehicles).

If there is other UK funding (to match the structural fund financing) which is non-approved aid, and spending of that particular fund can't be avoided by replacing it with another pot of public funds which is approved, it would be most efficient to notify this as an aid **scheme** or check to see that it complies with a block exemption rather than notify an ad hoc aid (i.e. an individual aid to one company). The advantage of notifying a **scheme** is that once approved, you don't have to keep notifying every use of it. If an aid scheme is notified, the SF manager will not have to work out **before** notifying, the precise amount which could be allocated to a particular project. Once the scheme were approved however, the SF manager would be required to apply the **cumulation rule** to every project.

If an ad hoc aid were notified, then it would be pragmatic for the SF manager to have ensured that the amount did not, when cumulated with the other aid including SF, exceed the relevant State aid ceiling for that particular project. In other words, there is no point in getting approval for £z if we can only pay £x.

Q **Is a notified/approved aid one which falls outside the agreed exemptions / ceilings?**

A No. On the contrary. Notified and approved State aid must respect the aid ceilings - otherwise the approval lapses, and indeed it wouldn't be approved in the first place. Another way to think of it is this: Why do we bother to notify aid and await Commission approval? It is so that we, and the firms concerned, can have confidence that the aid we pay is legal. Approval is not unconditional. It will only stick if the aid provided meets the terms of the approval, which in turn will reflect the terms of the relevant aid guidelines where these exist. State aid guidelines always make clear that the ceilings apply to all the State aid given to that particular set of eligible costs. **NOTE:** Even though de minimis aid only cumulates with other de minimis aid for the purposes of calculating the de minimis ceiling of €200,000, de minimis aid must be taken into account if given towards the costs supported under a notified or block exempted scheme to ensure that the permitted aid intensity for the notified scheme is not exceeded.

The **block exemption** regulations cover forms of State aid which are exempt from prior notification – **so long as** the conditions are met. The aid must comply with all the terms of the regulation, which will include aid ceilings (the SMEs, training and employment block exemption regulations threshold). The block exemption regulations do not exempt very large sums – these require Commission approval. You have to provide summary information on the aid provided under block exemption terms and maintain records for ten years.

De minimis aid is a volume ceiling, i.e. a total amount, rather than a percentage ceiling of project costs. You have to ensure compliance with the ceiling and other conditions and maintain records for ten years, but do not have to provide the summary information required for the block exemptions.

An approved aid **is** State aid and **must** be cumulated with State aid from any other source including Structural Funds and de minimis aid used **for the same purpose**.

Q. PPPs (Public Private Partnerships / Joint Ventures) Is there State aid where the public sector gets back something of the same value as that which the private partner or beneficiary gains?

A. There still could be State aid. The difficulty is in proving how a given **undertaking** has not received a State aid by virtue of the public sector intervention in the first place. This can most often be circumvented by going to open tender in choosing private partners for a project where benefits will be shared between the public and the private participants. Technically, because you go to open tender in selecting the private partners you get around the "distortion of competition" criterion of Article 87(1) in that all interested parties had a chance to bid for it.

Q. How do Public Private Joint Ventures steer clear from State aid concerns? How can one ensure that JVs/PPPs do not raise State aid problems?

A. This is by no means easy and such initiatives should be cleared with State Aid Branch. By market testing and placing OJEC (Official Journal of the European Community) notices you are certainly heading along the right lines. Here are some general introductory points to assist in steering clear of state aid when considering Joint Ventures:

1. Market Failure

The first is establishing that there is market failure. The project should, for example, concentrate only on property that is not attracting a private developer because it is not financially viable to buy and develop the site in question without public intervention. This should eliminate any State aid concerns that the partnership is potentially competing against such private developers.

2. Selecting a private partner(s)

In creating a Joint Venture Limited company, the public body should competitively select their private partners. This should be done through rigorous advertising, which outlines the criteria that need to be met by the partner(s). The purpose of this is to prevent selectivity towards particular partner(s), which could in turn improve their competitiveness

in the market place. By the same reasoning, it might be sensible to have only a three / four year contract with the selected partner(s) and then undergo another open tender. This should minimise the potential to distort competition in favour of the initial partner(s) as the project grows. This open tendering exercise might also provide a better guide as to how much public money needs to be made available to make the project happen.

3. Generated income

Another State aid implication is how the proceeds from projects are split. This includes the revenue created whilst projects are ongoing as well as to the way profits/assets are divided upon expiry of a scheme. A Joint Venture is generally considered to be free of State aid if the public and private contributions to the project are symmetrical in what each gets out of the project. For example, if the ratio of funds channelled in is 75% public and 25% private, this ratio should be respected in receipts. This would mean that the private partner(s) should receive only 25% of the proceeds. By the same token, just as all profits should be shared between public and private, so should all risks, again in proportion to their contribution to the venture.

4. Getting started

A final point to draw out involves the timing of the public and private funds being made available to the Joint Venture. In order to remain free from State aid, the public funds should not be made available to the Joint Venture before the private funds. It is recommended that each contribution is synchronised although there is nothing to stop the private money preceding the public.

In summary: There is no aid where all investors in a JV/PPP share risks and rewards on exactly the same terms, i.e. as there is no benefit, there is therefore no State aid. By contrast there is State aid where the public partner subordinates its return, enabling a commercial return to the private investors. The government participation is State aid. *How about the aid issue to beneficiaries of a PPP/JV Fund's investments?* There will be no State aid if the fund in question invests on exactly the same terms as other funds and there is no aid to beneficiaries of the funds. This is the case for our UK High Tech Fund which was approved. The State aid rules are agnostic about the legal status of an undertaking. They only affect PPPs where the participation of the public partner provides a benefit to the private partner and/or the PPP as an entity provides a benefit to others.

Q Is funding to universities treated as aid?

A It depends what activities are being funded. Public funding of universities' core teaching and research functions does not constitute state aid. However, where a university is carrying out an economic activity (for example, providing charged research and consultancy to businesses), aid will be involved unless there is clear separation and no cross subsidy between the university's core public and economic functions. Case law is developing in this area and if in doubt you should contact the State Aid Branch.

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