

## NORTHERN IRELAND EU STRUCTURAL FUNDS

### STATE AID

#### Structural funds and State Aid

1. Although Structural Funds are financed from the EU budget, they are still considered as national resources as the Government has a say in how the funding is spent. Council Regulation (EC) 1083/2006 stipulates that projects must be fully compliant with State Aid rules. It is therefore important that all projects are initially screened and regularly reviewed to ensure they comply with State Aid rules.

#### What are the State Aid rules?

2. Article 87(1) of the Treaty of Rome sets out the criteria as to what constitutes State aid.

*State Aid is any aid granted by a Member State, or through State resources in any form whatsoever which distorts, or threatens to distort competition by favouring certain undertakings or production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the Common Market.*

3. State Aid includes not only Government projects/Programmes (including those financed by EC Structural Funds) but any incentive/sweetener e.g. preferential tax rates for a particular group of companies.
4. The European Commission (EC) considers that State Aid can include the following:
  - Grants to Firms for Investment, Training or Research and Development;
  - Cash injections to public enterprises;

- Loans and Guarantees;
  - Consultancy advice;
  - Infrastructure projects benefiting identifiable end users;
  - Provision of goods or services on preferential terms;
  - Contracts not open to competitive tendering.
5. Whilst the list is by no means exhaustive, it does reflect some of the activities associated with Structural Funds programmes.
6. However, whilst the Commission has concluded that State Aid is “incompatible with the Common Market” it also acknowledges that aid may be compatible in certain circumstances. In particular, the Commission also states that aid to facilitate the development of certain economic activities or of certain economic areas, may be compatible providing such aid does not affect trading conditions to an extent contrary to the interest. The Commission also allows aid for the promotion of culture and heritage conservation, aid to promote economic development in areas where the standard of living is abnormally low or where there is serious unemployment and aid to promote the execution of important subjects of common European interest.
7. Such ‘compatible’ aid is defined and regulated by the State Aid rules.

### **Who is Responsible for ensuring compliance with State Aid rules?**

8. It is the responsibility of the aid provider/Implementing Body to ensure that aid schemes comply with the State Aid rules. Unauthorised State Aid is illegal, and the consequences of giving illegal State Aid can be severe, for example:
- aid payments can be suspended;
  - recipients may have to repay the aid with interest;
  - policies may have to be altered; and

- Government could be sued by the aid beneficiaries' competitors for damages.
9. To ensure propriety of expenditure, and to protect Ministers and Accounting Officers, it is normal procedure, when designing policies and drawing up implementation proposals to carry out a range of checks e.g. equality proofing and checking the environmental impact. Proofing policies and programmes against State Aid rules is another essential checklist item. Programme Managers should ensure that, when assessing projects, they clearly identify which activities within the project qualify as State Aid and which do not. This action also helps avoid the risk of illegal State Aid and ultimately of political embarrassment to Ministers, the financial costs of recovering aid from beneficiaries and the costs to Departments in the settlement of claims for damages from the beneficiaries' competitors.
  10. Implementing Bodies are reminded that if an aid scheme has already received State Aid approval, but this approval expires within the EU funding period 2007-2013, they need to re-notify or re-register to ensure a continuation of the scheme's State Aid approval.

### **Identifying if State Aid is involved**

11. The following paragraphs indicate how to identify State Aid and detail the key questions that need to be answered. The answers to these should be recorded and filed.
12. State Aid can be described generally as any form of assistance provided to an **undertaking** by a public body, publicly-funded body or body under public sector control, which provides the **undertaking** with an advantage and has the potential to distort competition between Member States of the EU.

13. In addition, any funds which are not directly from UK Government sources (e.g. National Lottery funds or Structural Funds) must also comply with State Aid rules because these funds are deemed to be under public control.
14. Therefore, the first step in the State Aids assessment is to establish whether the beneficiary is, or is likely to become, an **undertaking**.
15. Generally, companies, self-employed people and sole traders will all be considered as **undertakings**. *Private individuals and households are not considered **undertakings**.*
16. In the case of voluntary and non-profit making public or private bodies such as charities or universities, it is important to assess whether they are engaged in (or are about to become engaged in) activities which have commercial competitors. If they are, then they could be **undertakings**.
17. The Commission defines an **undertaking** as an organisation which is involved in *economic activity*, i.e. it is involved in **activities** that result in the production of certain goods or the supply of certain services for which there are actual or potential commercial competitors.
18. If none of the activities or potential activities are economic, the beneficiary organisation is **not** an undertaking and the aid cannot be State Aid.
19. Once it has been established that the beneficiary is an undertaking, there are 5 questions that must be considered in order to establish whether aid constitutes State Aid. **Only** if the answer is **'Yes' to all 5 questions** is State Aid involved. If **'No'** is the answer to any **one** of the questions, the funding is not State Aid and therefore the State Aid rules do not apply.

**(i) Is the aid granted by the State or through State resources?**

This test is usually straightforward and the answer is usually 'yes'.

As well as Central Government Departments, 'by' or 'through' means aid from regional or local authorities, as well as other public or private sector bodies designated or controlled by the State. State resources include grants, tax exemptions, loans, guarantees, services, loans of staff, etc. Other funds not permanently belonging to the State but under State control, e.g. Lottery funding, are also regarded as being analogous to State resources. This includes European Structural Funds as the State has direct control over these.

**(ii) Does it confer an advantage?**

State Aid rules are concerned primarily with the effect on competition and trade, not the form of a measure, nor the intention behind it. Therefore, it is important to establish the effect of the aid on the beneficiary (i.e. does it provide an advantage). If the aid reduces a beneficiary's costs or provides the beneficiary with facilities, staff, equipment or infrastructure, which have been partly funded by the State, it will usually be concluded the aid has provided an advantage.

It is also important to establish, when aid is provided through intermediary bodies, that they are not also getting an advantage as the aid flows through them.

**(iii) Is it selective, favouring certain undertakings?**

Measures are either 'selective' or 'general'. Therefore, when a measure applies only to a specific group of companies or sector or geographic region, e.g. Northern Ireland, it will usually be considered as being selective.

General measures are those that affect all undertakings in the whole of the State's economy (e.g. nationwide tax and fiscal measures). State Aid rules do not apply to such general measures.

Since aid schemes in Northern Ireland tend to target aid to undertakings located in Northern Ireland, they are almost always selective and the answer to this question is almost always 'yes'.

**(iv) Is the activity tradable between Member States?**

The Commission's interpretation of this is very broad – it is sufficient that a product or service is subject to trade between Member States, even if the aid beneficiary itself does not export to the EU. Consequently most activities are viewed as tradable and the answer to this question is almost always 'yes'.

**(v) Does the Activity distort or have the potential to distort competition?**

If the aid has the potential to strengthen the position of the beneficiary relative to other competitors, then it has the potential to distort trade and competition. Significantly, the distortion of competition does not have to be substantial or significant, and includes small amounts of aid and firms with little market share. Therefore most interventions have the potential to distort competition.

There is some limited scope to conclude that a measure does not distort trade between Member States (and is therefore not State Aid) if it can be demonstrated that aid is limited to financing 'local activities'. However, caution is needed as this is a complex area. It is strongly advised that funders wishing to demonstrate an activity is local take specialist State Aids advice, including advice from economists and Departmental Solicitor's Office or legal council with proven expertise in State Aid's law.

By way of example, a key case in the UK relates to aid to the **Brighton Pier** Trust. In this case, the Commission concluded the Trust was an undertaking, because running a heritage centre was an economic activity. However the Commission decided that the activity of running a heritage centre was not likely to distort trade between Member States and so was not State Aid.

Unfortunately the Commission does not clearly define what is meant by 'local activities' and each case needs to be considered in isolation.

### **Next Steps – If the aid is State Aid**

20. If a measure is judged to be State Aid, it will either be notified to the European Commission (i.e. a full notification) or be registered and comply with the requirements of a block exemption regulation (e.g. the General Block Exemption Regulation (GBER<sup>1</sup>) or it must comply with the *de minimis* regulation<sup>2</sup>.
21. When a 'full' notification is necessary, the Commission must approve the aid or an aid scheme before it is put into operation. This can take 6 – 12 months and Programme Managers are encouraged to start early and consider State Aid notification issues when developing the aid scheme. In addition, for complex or novel cases, Programme Managers Departments should also consider pre-notification meetings with the Commission. When such meetings are arranged these must be arranged through BERR and UKREP.
22. The Commission has delegated to Member States responsibility for approving schemes under block exemption regulations. In practice, the administrative requirements of the notification/registration process is less onerous than a full notification. The trade off is that the aid must be

<sup>1</sup> **GBER**: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008R0800:EN:NOT>

<sup>2</sup> **De minimis**: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R1998:EN:NOT>

transparent and restricted to the forms detailed in the block redemption regulations.

23. The final route to State Aid cover is through the *de minimis* regulation, which sets out a threshold figure for aid below which Article 87 (1) of the Treaty can be said not to apply.
24. When *de minimis* aid is being awarded the aid giving body must:
  - a. Ensure the beneficiary is eligible to receive *de minimis* aid;
  - b. Ensure the aid to be granted does not take the total value of *de minimis* aid to the beneficiary over the *de minimis* threshold; and
  - c. Inform the beneficiary in writing that it is in receipt of *de minimis* aid and detail the amount of the aid in gross grant equivalent terms.

There must also be an express reference in the Letter of Offer to the 'De Minimis Regulation 1998/2006 as published in the Official Journal of the European Journal dated 28 December 2006'.

Since the Commission can request Member States provide information to demonstrate compliance with the *de minimis* regulation, within a period of 15 working days, all aid giving bodies must maintain detailed records on the *de minimis* aid they have provided over the preceding 10 years. As a minimum these records must include the name of the beneficiary, the name of the scheme, the value of the aid awarded and the date the aid was awarded.

25. Further information on the frameworks and regulations that apply to State Aid can be obtained at <http://www.berr.gov.uk/whatwedo/businesslaw/state-aid/rules/frameworks/page28712.html> and from the Commission's website [http://ec.europa.eu/comm/competition/state\\_aid/overview/index\\_en.cfm](http://ec.europa.eu/comm/competition/state_aid/overview/index_en.cfm)

It should be noted that the State Aid rules are evolving all the time and it is therefore Departments and aid giving bodies responsibility to regularly check to ensure they are following the current version and still within the applicable aid ceilings.

26. Finally, although it is the responsibility of aid administrators/Implementing Bodies to consider State Aid and to make decisions on how to comply, DETI can offer advice and guidance on industrial State Aid matters including the current level of aid ceilings and can be contacted by email at [stateaid@detini.gov.uk](mailto:stateaid@detini.gov.uk).

Departments should also note that the Agricultural and Transport sectors have their own set of State Aid rules. The agriculture rules can be accessed at DG Agri's State Aid website [http://ec.europa.eu/agriculture/stateaid/index\\_en.htm](http://ec.europa.eu/agriculture/stateaid/index_en.htm).

27. Please note that DETI's role in relation to State Aid is to raise awareness, provide advice, contribute and co-ordinate NI input into State Aid reports and the development of UK State Aid policy. DETI does not monitor whether Departments are adhering to State Aid rules and has no authority to rule on State Aid issues. Therefore, when there is any uncertainty, aid administrators may wish to consider seeking legal advice.

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**1<sup>st</sup> Revision – January 2009**