

STATE AID – A BEGINNER’S GUIDE

Guidance Notes

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Table of Contents

What is a State Aid?.....	1
Rationale	2
Granting State Aid legally.....	2
Getting it wrong.....	3
Export aid.....	4
Helpful resources	4
BIS State Aid Branch	4

STATE AID – A BEGINNERS GUIDE

What is a State Aid?

Where a public body provides financial support to an undertaking, it is necessary to consider whether such support constitutes state aid.

Financial support granted to undertakings must also meet **all** the conditions set out in the European Community (EC) Treaty for it to be considered as state aid.

The EC Treaty¹ declares that state aid, in whatever form, which could distort competition and affect trade by favouring certain undertakings or the production of certain goods, is illegal.

These are the key questions that should be considered:

1. Is the support granted by the state or through state resources?

This includes all public and private bodies controlled by the state. State resources include tax exemptions and also funds not permanently belonging to the state but which the state may direct, such as EU Structural Funds.

2. Does the support confer a selective advantage to an undertaking?

The State Aid rules only apply in respect of financial support to undertakings, that is to say any entity which is engaged in economic activity. If support is provided to an entity engaged in a non-economic activity, then it cannot be state aid. Therefore, support given to individuals, through the social security system for example, would not be considered as state aid.

Economic activities are those which involve the placing of goods or services on a given market. It should be noted that it is not necessary for the goods or services to be supplied at a profit for them to be economic activities. Also, in determining whether an entity is an undertaking it is important to look at the activity and not the form, thus public sector bodies and charities would be undertakings in respect of any economic activities that they undertake.

A benefit to an undertaking, granted for free or on favourable (non-commercial) terms, could be state aid. This includes the direct transfer of resources, such as grants and soft loans, and also indirect assistance - for example, relief from charges that an undertaking normally has to bear, such as a tax exemption or the provision of services, loans, at a favourable rate. Support that targets particular businesses, locations, types of firm e.g. SMEs or sectors will be considered selective. By contrast; general tax measures,

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E087:EN:HTML>

such as business taxation, when applied equally to all undertakings fail this test and are not considered as state aid.

3. Does the support distort or have the potential to distort competition?

If the support strengthens the position of the beneficiary relative to other competitors then this criteria is likely to be met. The potential to distort competition does not have to be substantial or significant, and this criterion may apply to relatively small amounts of financial support and firms with little market share.

4. Does the support affect trade between Member States?

The Commission's interpretation of this is broad - it is sufficient that a product or service is tradeable between member states, even if the recipient of support does not itself export to other EU markets.

Rationale

The rationale for the prohibition on state aid is quite simple. Providing such selective advantages can reduce the incentive for beneficiaries to innovate, and discourage new market entrants. This has a negative effect on competitiveness and is ultimately a bad deal for consumers, who will be less likely to benefit from price/quality competition amongst businesses.

Granting State Aid legally

There are however exceptions to the rule that the provision of state aid is illegal. The EC recognises that there will be times where the advantages outweigh the disadvantages. The EC Treaty therefore contains a number of exemptions which enable Member States to grant State Aid legally.

It is these Treaty exemptions, on which the Commission's Frameworks, Guidelines and Block Exemptions are based, which enable Member States to legally give certain kinds of aid that will help achieve Community market or equity objectives, in circumstances where the market fails to properly provide.

These Community objectives include the promotion of Research, Development & Innovation, Environmental Protection, access to venture capital, access to broadband, investment in SMEs and support for public services – such as rural transport and social housing.

Aid must be given within the parameters of the rules set out by the Commission, and in the case of Frameworks and Guidelines; aid must be notified and approved by the European Commission before it can be given by a public body.

In terms of timing, a standard notification might take 6-9 months to be

approved. Notifications that present new issues; are contentious, or which do not fall under existing rules may well take longer, especially if there is the need for a formal investigation.

The Commission also provides a simple method of providing financial support to undertakings. This is via the General Block Exemption Regulation (GBER). This is for a whole range of aid measures that are considered less problematic in competition terms, i.e. less distortive. This enables notified aid to be granted without the need for approval in each case where a measure meets the terms of the Regulation. Twenty six areas are covered by the GBER; these include:

- Regional Aid
- SME Aid
- Aid to Disadvantaged and Disabled Workers
- Aid for Environmental Protection
- Risk Capital Aid
- Training and Employment Aid
- Aid for Research, Development and Innovation

Small amounts of financial support (less than €200,000 to any undertaking over any rolling three year period) are considered to be de minimis amounts. This aid may be given without the need for notification or approval, though records of aid granted must be maintained. Please note that all the terms of the De Minimis Regulation must be followed. It is very easy to make a mistake, especially where undertakings are not independent but linked to other undertakings, such as a parent company.

The UK also has a number of different approved aid schemes in place that may be used by public authorities which may provide the legal cover required by a public body when it wishes to provide financial support.

This includes temporary measures aimed at addressing the current financial and economic crisis, such as aid in the form of state guarantees of loans for businesses, small amounts of compatible aid (up to €500,000 per undertaking), and subsidised interest rates for loans.

Beyond this the UK has a wide range of ongoing schemes that may provide legal cover in a wide variety of areas, including regeneration activities.

These options should be investigated once a determination has been reached that a proposed measure involves state aid.

Getting it wrong

The Commission takes a serious view of aid provided without its approval and aid payments can be halted while the legality of the aid is halted. Even if the aid is ultimately approved the Commission can order recovery of the cash flow benefit for the period that the aid was granted without legal cover.

Where the Commission finds aid to be illegal the consequences are serious. The Commission is under a legal obligation to seek the recovery of the aid from the recipient, plus interest, and competitors may also seek legal action for damages.

In recent years the Commission has given increasing priority to applying state aid rules more rigorously.

It is therefore extremely important to establish whether a project or policy proposal constitutes State aid and, if so, how they be taken forward in compliance with the State aid rules - whether they require notification to the Commission, or do they fit within an existing approved.

Export aid

While many kinds of aid can be notified and approved by the Commission; aid for export activities is prohibited. Export aid is defined as aid to export-related activities, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity.

Helpful resources

A summary of the state aid rules currently in force can be found here:

http://ec.europa.eu/competition/state_aid/studies_reports/vademecum_on_rules_09_2008_en.pdf

A guide to those rules pertinent to SMEs may be found here:

http://ec.europa.eu/competition/state_aid/studies_reports/sme_handbook.pdf

In calculating the value in Euros of an award given in Sterling, this table should be used -

http://ec.europa.eu/budget/inforeuro/index.cfm?fuseaction=currency_historique¤cy=GBP&Language=en

If you wish to give a loan at commercial rates, you should use the methodology set out here:

http://ec.europa.eu/comm/competition/state_aid/legislation/reference_rates.html

The relevant dates for both the exchange rate and the reference rate will be the date that the aid is committed in the public authority's accounts.

BIS State Aid Branch

BIS State Aid Branch has responsibility for state aid policy in the UK (with the

exception of agriculture and transport state aid, which are dealt with by Defra and Dft respectively). Its role includes processing state aid notifications and helping to get notifications approved.

State Aid advisers are also available to provide advice to public bodies on how to design schemes to avoid state aid or to be state aid compliant and how best to respond to complaints made about aid granted. In the first instance you may wish to consult the guidance set out on the BIS State Aid Branch website –

<http://www.bis.gov.uk/policies/business-law/state-aid/advice-on-state-aid>

Email enquiries may be directed to: sapu@bis.gsi.gov.uk

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Department for Business, Innovation & Skills

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