

THE STATE AID GUIDE

Guidance for state aid
practitioners

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The State Aid Guide

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PART I - What is State Aid?

Concept

State aid is a Member State's financial aid to business which meets all the criteria in Article 107¹(1) of the Treaty on the Functioning of the European Union (The TFEU). Article 107(1)² 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 incompatible with the common market - unless the Treaty allows otherwise.

Key Criteria

State aid in the sense of Article 107(1) has four characteristics:

i) It is granted by the State or through State resources: State resources includes public funds administered by the Member State through central, regional, local authorities or other public or private bodies designated or controlled by the State. It includes indirect benefits such as tax exemptions that affect the public budget.

ii) It favours certain undertakings or production of certain goods: It aids an undertaking, i.e. an entity engaged in economic activity. Economic activity is activity for which there is a market in comparable goods or services. It can include voluntary and non profit-making public or private bodies such as charities or universities when they engage in activities which have commercial competitors. It includes self-employed/sole traders, but generally not employees as long as the aid does not benefit the employers, private individuals or households.

The aid is available to certain undertakings but not others in the Member State, eg it selects individual businesses, sectors, areas, sizes of business, or production of certain goods (a benefit available to all businesses is not State aid but a general measure).

It favours them by conferring an advantage on them. An advantage may be direct or indirect, e.g. grants or favourable loan terms or services provided at less than market cost, or relief from charges a business would normally bear.

iii) It distorts or threatens to distort competition: It potentially or actually strengthens the position of the recipient in relation to competitors. Almost all selective aid will have potential to distort competition - regardless of the scale of potential distortion or market share of the aid recipient.

iv) It affects trade between Member States: This includes potential effects. Most products and services are traded between Member States and therefore aid for almost any selected business or economic activity is capable of affecting trade between States even if the aided business itself does not directly trade with Member States. The only likely exceptions are single businesses, eg hairdressers or dry cleaners with a purely local market not close to a Member State border. The case law also shows that even very small amounts of aid can affect trade.

Forms of State Aid

¹ Articles – new numbering http://ec.europa.eu/competition/state_aid/legislation/provisions.html

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E087:EN:HTML>

State aid within the scope of Article 107(1) examples:

- State grants;
- interest rate relief;
- tax relief;
- tax credits;
- State guarantees or holdings;
- State provision of goods or services on preferential terms;
- direct subsidies;
- tax exemptions;
- preferential interest rates;
- guarantees of loans on especially favourable terms;
- acquisition of land or buildings either gratuitously or on favourable terms;
- provision of goods and services on preferential terms;
- indemnities against operating losses;
- reimbursement of costs in the event of success;
- State guarantees, whether direct or indirect, to credit operations preferential re-discount rates;
- dividend guarantees;
- preferential public ordering;
- reduction of, or exemption from, charges or taxes, including accelerated depreciation and the reduction of social contributions;
- deferred collection of fiscal or social contributions;
- assistance financed by special levies;
- capital transfers;
- certain State holdings in the capital of undertakings.

Less obvious examples where State aid might arise include:

- consultancy advice;
- advantages resulting from the activities of agencies for urban renewal;
- assistance to help companies invest in environmental projects;
- assistance to help a public enterprise prepare for privatisation;
- legislation to protect or guarantee market share;
- public private partnerships and contracts not open to competitive tendering;
- Receipt of landfill tax credit funding.

Some surprising examples of State aid:

- free advertising on State owned television;
- infrastructure projects benefiting specific users.

In sum, there may well be State aid in the Article 107(1) sense whenever Member States confer an advantage of a financial kind on some, but not all, undertakings by:

- providing grants or other forms of funding (eg National Lottery funding);
- waiving sums due (eg taxes, social security contributions, loan interest, dividends);
- selling assets, goods or services at below market value; or
- buying assets, goods or services at above market value.

Exceptions to the General Ban on State Aid

Article 107(1) acts as a general ban, but the Treaty then allows for certain aid. The following categories are the exceptions where the European Commission - which enforces State aid rules - may approve State aid:

• **aid categories that the Treaty declares compatible:** Article 107(2) specifies three types of aid that it declares compatible:

- social aid granted to individual consumers;
- aid to make good damage by natural disasters or exceptional occurrences;
- aid to certain areas of Germany affected by the division of Germany.

(Note: In practice, Article 107(2) categories will seldom arise).

• **aid categories that may be considered compatible:** Article 107(3) allows the possibility of approving State aid to:

- 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;
- Promote economic development of areas of abnormally low standard of living or serious unemployment;
- Promote an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
- Promote culture and heritage conservation;
- Other categories of aid the Commission may propose and the Council may specify.

• **other Treaty provisions for specific purposes:** The Treaty allows further possibilities for approval of State aid, under specific rules:

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

The Effect of Possible Exceptions

The possible exceptions under Article 107(3) mean that even where the proposed aid would be Article 107(1) State aid and there could be some effect on competition, the European Commission may, exceptionally, approve the giving of that State aid as being compatible in the common interest of the EU. However, please note:

• **Operating aid is not likely to be approved as an exception:** Aid for the normal costs of running a business, such as salary costs, is very unlikely to be authorised as an exception - apart from in certain very limited specific circumstances, such as those in the environmental State aid guidelines or in Article 107(3)(a) areas.

• **Requirement to notify the European Commission of proposed exceptional aid:** Article 108(3) of the EC Treaty requires you to notify the Commission of

proposed State aid so that it can decide whether or not it is compatible with the Treaty.

You must notify and obtain Commission approval before offering State aid - unless it is exempted from advance notification by the General Block Exemption Regulation (GBER). The GBER contains categories of State aid that the Commission has declared compatible with the Treaty if they fulfil certain conditions, thus exempting them from the requirement of prior notification and Commission approval. (See more on the GBER under Part III of this guide)

Note: Failure to notify and obtain advance Commission approval for a State aid which is not exempted makes it automatically unlawful and recoverable.

i) **The Commission's role:** The Commission has wide power to control and monitor State aid. It may refuse approval. It may approve State aid under Article 107(3) or other possible exceptions, either by formal legal regulation or after individual scrutiny and approval of a proposed aid scheme or project.

ii) **Commission uses formal guidelines and frameworks:** In considering proposed aid, it is guided by criteria in published frameworks and guidelines that apply to particular aid categories or purposes and in all Member States.

iii) **If relevant guidelines do not exist or if proposal does not fit guidelines:** Even if a proposed State aid does not precisely fit formal frameworks or guidelines, or is in a category or for a purpose for which there are no relevant published frameworks or guidelines, the possibility exists that 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.

This is not to suggest a probability that it will do so: guidelines are not normally overridden and even where there are no relevant guidelines one would have to have a convincing case. However, if there are relevant guidelines and the scheme does not stick completely to it then the Commission will open an Article 108(2) investigation³.

State Support Not Prohibited by Article 107(1)

State aid rules apply only to aid that has all four elements set out in Article 107(1). If it does not have all four, Article 107(1) does not forbid it.

Aid outside the scope of Article 107(1) (i.e. aid that does not have all four elements in Article 107(1)) includes:

- aid to public bodies not involved in economic activities;
- general measures available to all economic undertakings in all parts of the Member State, eg a tax exemption or credit available to all businesses;
- State measures that do not affect the public budget, eg regulatory measures;

³ See more on Article (108)2 Investigations on the BIS' State aid website under 'Complaints' and the Commission's website http://ec.europa.eu/comm/competition/state_aid/legislation/rules.html

- full market value purchases of goods and services (most effectively demonstrated by a competitive tender that accords with EU public procurement rules);
- support to public undertakings that satisfies the market economy investor principle (broadly, support that a private sector investor would provide in like circumstances (see (i) below for further details);
- support for general infrastructure projects that do not benefit specific users;
- aid to individuals or employees which does not directly benefit an undertaking;
- certain State guarantees – (see (ii) below);
- certain measures connected with the production of or trade in arms and ammunitions;
- damages which national authorities are ordered to pay by a Court.

i) Use of public funds in accordance with the private investor principle also known as Market Economy Investor Principle (MEIP)

If the State is acting in a way that a private investor would in a market economy, for example in providing loans or capital on similar terms to that of a private investor, it is not providing State aid within the meaning of Article 107(1). This can apply when the State is the main shareholder in an undertaking (e.g. Royal Mail). The onus is on the Member State to be able to demonstrate if challenged that the funding is on genuinely commercial terms. You are strongly recommended to commission an independent report from a reputable source to confirm that the actions you have taken are in accordance with the MEIP. The Commission would certainly expect nothing less in the event of challenge.

When it is a State-controlled company, the key question is whether a private investor - who would not take into account regional development or employment concerns, but who would expect to make an eventual return - would invest in this way.

The Commission does not expect you to act like an investor who is only out to make a quick return, but one who has a long-term commitment - for example the owner of a private factory. It will also not penalise you if you make a decision which later turns out to be wrong if at the time you had reasonable grounds to believe that the investment would come good.

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) – see article on the Market Economy Investor Principle in the June 2002 edition of DG Competition’s Competition Policy Newsletter⁴ (please note that this article set out the principles on which the MEIP can be applied but if you think you are in MEIP territory please discuss with SAB). This article argues that the most robust way of demonstrating that a State investment is on commercial terms is by ensuring that there is a matching investment by an actual commercial entity, provided that the risks and rewards are genuinely the same.

⁴ Competition Policy Newsletter – June 2002
http://ec.europa.eu/comm/competition/publications/cpn/cpn2002_2.pdf

ii) State guarantees under certain circumstances

State guarantees⁵, 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, because they remove the element of risk that the enterprise would otherwise have to bear.

Under the following conditions, State guarantees do NOT constitute State aid under 107(1):

a) In the case of an individual guarantee:

- i. The borrower is not in financial difficulty;
- ii. The borrower would in principle be able to obtain a loan on market conditions from the financial markets without any intervention by the State;
- iii. 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;
- iv. 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).

b) In the case of a guarantee scheme

- i. The scheme does not allow guarantees to borrowers in financial difficulty;
- ii. The borrowers would in principle be able to obtain a loan on market conditions from the financial markets without any intervention by the State;
- iii. 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;
- iv. 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;
- v. 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;
- vi. 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.

Seek advice: If there is any doubt as to whether a planned guarantee or scheme does constitute State aid, seek advice from your devolved administration or BIS' State Aid Branch, DEFRA or DfT.

⁵ Link to Commission Notice 2000/C71/07
http://ec.europa.eu/comm/competition/state_aid/legislation/instruments.html

PART II - Options for Dealing with State Aid

The first step is to assess whether or not a proposal for financial assistance constitutes State aid by ensuring that it meets all four tests as specified in the Key Criteria Section of “What is State Aid”.

If it may constitute State aid, the following proposals represent options for dealing with it:

- i. consider developing or adapting proposals to omit or minimise the element of State aid within the meaning of Article 107(1);
- ii. design or adapt the proposed aid to fit within the terms of one of the State aid schemes which the European Commission has approved for the UK⁶;
- iii. design or adapt the proposed aid to fit one or more of the categories of State aid within the GBER⁷;
- iv. design or adapt the aid to fit within the terms of published guidelines, frameworks, notices and communications which the Commission uses when deciding whether proposed State aid may, exceptionally, be compatible with the Treaty. (NOTE: This option requires you to obtain advance approval from the Commission⁸);
- v. design the assistance within other relevant permissible Articles of the Treaty. (NOTE: May require Commission advance approval);
- vi. design a proposal which, although it may not fit within existing approved schemes, Commission Regulations, frameworks or guidelines, may be capable of individual approval by the Commission. (NOTE: Advance approval required);
- vii. design or adapt the aid to fit within the de minimis regulation;
- viii. design or adapt the aid to fit relevant categories of State aid in Article 107(2) of the Treaty which are declared compatible with the Treaty. (NOTE: rarely arise);
- ix. consider under all options special sectoral rules, eg for agriculture, fisheries, transport and sensitive sectors, which may limit the possibilities. Certain sectors are excluded from block exemptions, for example, and sectoral rules are generally more restrictive than the guidelines and frameworks that apply across industry in general.

Unless you are certain, always consult your local source of advice such as your devolved administration, State Aid Branch or equivalent even before concluding that your plans do not involve State aid, or that your proposed plan to avoid it, really does escape the scope of Article 107(1).

Seek further advice at all stages of considering all the available options. Seeking advice is not a last resort: the earlier the better, to avoid problems later on.

⁶ See State aid cases on the Commission's website http://ec.europa.eu/competition/state_aid/register/

⁷ See block exemption procedures under the BIS' State aid website.

⁸ See Notification procedures under the BIS' State aid website and also the Commission's website http://ec.europa.eu/comm/competition/state_aid/legislation/rules.html

PART III - Regulations, Guidelines and Frameworks, Communications

Concepts⁹

(i) Regulations - aid not requiring advance notification and approval

The Commission has adopted the GBER for individual aid measures or aid schemes that satisfy all the conditions laid down in it. In addition, the de minimis regulation covers small amounts of aid up to a certain limit, which may be paid for almost any purpose, subject to conditions set out in the Regulation. You do not have to notify and obtain prior approval from the Commission before awarding aid that complies with these regulations. There are however procedures to follow¹⁰. A summary of the conditions to fulfil when giving aid under the GBER is provided for in the following sections of this guide.

(ii) Guidelines, frameworks, communications - aid requiring notification and approval

The Commission has also developed a number of guidelines, frameworks 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 approval from the Commission for proposed schemes or payments under these. Awarding aid without doing so would make it unlawful aid¹¹.

The Commission recently adopted "The Best Practice Code¹²" a final part of its Simplification Package. The code sets out day-to-day best practices to contribute to speedier, more transparent and more predictable state aid procedures at each step of the investigation of a notified or non-notified case or a complaint. A process introduced within this code is the pre-notification process.

Pre- Notification Process¹³

There is added value where a pre-notification contact has been made as this provides the Commission services and the notifying member states the opportunity to refine their arguments, in discussions with the Commission, prior to formal notification. This is aimed at expediting the approval process. Pre-notification contacts are strongly recommended for most cases except for a few that could be classified as very straightforward cases.

The following notes summarises the main provisions of the most commonly used regulations, guidelines, frameworks and communications, and provide links to the original texts and to the special rules applying to particular sectors. These notes are intended to help but you should always check the wording of the original legal texts

⁹ Copies of Regulations, Guidelines and Frameworks are available on the Commission's website and on the BIS' State aid website.

¹⁰ See Block Exemption procedures under the BIS' State aid website.

¹¹ For more information on notifying aid see our webpage at

[State Aid Notification Procedures | Policies | BIS](#)

¹² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:136:0013:0020:EN:PDF>

¹³ <http://www.bis.gov.uk/assets/biscore/business-law/docs/state-aid/10-1154-state-aid-notification-process-flowchart.pdf>

when developing policy proposals for aid to business. In particular, you should note that these instruments are subject to regular review by the Commission and the provisions may change accordingly¹⁴.

A. Regulations

1) De Minimis Aid Regulation

Scope¹⁵: The Regulation covers small amounts of aid ("de minimis" aid) which do not count as State aid in the sense of Article 107(1).

The de minimis rule does not apply to:

- Undertakings active in the fishery and aquaculture sectors;
- Undertakings active in the primary production of agricultural products¹⁶;
- Undertakings active in the processing and marketing of agricultural products (i) when the amount of aid is fixed on the basis of the price or quantity of such products purchased from primary producers or put on the market by the undertakings concerned; (ii) when the aid is conditional on being partly or entirely passed on to primary producers;
- Export-related activities towards third countries or Member States (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). **Note:** it **does** apply to the costs of participating in trade fairs or studies or consultancy services needed for the launch of a new or existing product on a new market.
- Aid contingent upon the use of domestic over imported goods;
- Undertakings active in the coal sector;
- Aid for the acquisition of road freight transport vehicles granted to undertakings performing road freight transport for hire or reward;
- Undertakings in difficulty.

Concept

The de minimis regulation sets a threshold figure below which Article 107(1) can be considered not to apply. As such the measure need not be notified in advance to the Commission. This is based on an assumption that in most cases, aid up to this amount will not affect trade and competition between Member States.

Criteria

The total de minimis aid granted to any one undertaking must not exceed €200,000 over any period of three fiscal years. For undertakings active in the road transport sector, the total de minimis aid shall not exceed €100,000 over any period of three fiscal years.

¹⁴ Link to the Commission's website http://ec.europa.eu/competition/state_aid/overview/index_en.html

¹⁵ Reference Commission Regulation (EC) No 1998/2006 of 15 December 2006: See Rules and Regulations on the State Aid website – de minimis aid regulation

¹⁶ Separate, more restrictive de minimis rules exist for the agricultural sector

These ceilings shall be expressed as a cash grant. The figures should be gross, before any deduction of tax or other charge. Where aid is awarded in a form other than a grant, the aid amount shall be the gross grant equivalent of the aid.

Cumulation

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 aid intensity would exceed what is allowed under the block exemption or notified scheme.

Requirements of the Regulation¹⁷

Where an aid provider grants de minimis aid, it must:

- Inform the recipient in writing of the prospective amount of aid and of its de minimis character, referring to the de minimis regulation;
- Obtain from the recipient full information about any other de minimis aid received during the previous two fiscal years and the current fiscal year;
- Only grant the new de minimis aid after having checked that this will not raise the total amount of de minimis aid received by the undertaking during the relevant period of three years to a level above the permitted ceiling.

Record keeping

The Regulation requires Member States to record information necessary to demonstrate that the Regulation has been complied with, and to keep records of all de minimis aid paid for ten years from the last payment.

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.

Period of validity

This Regulation applies from 1 January 2007 until 31 December 2013.

¹⁷ See de minimis procedures section of the State aid website for more information

2) General Block Exemption Regulations (GBER)

This Section summarises the GBER which declares certain categories of aid compatible with the common market and exempts aid givers from the obligation to formally notify. Aid givers only have to inform the Commission up to 20 days after the aid has been granted using a simple information sheet.

It aims to give an overview of the applicable rules and does not provide an exhaustive description of the rules or the way they should be applied. Aid givers should always check the original legal text of the GBER when developing policy proposals for aid to businesses.

Scope

The GBER applies to nearly all sectors of the economy except for fisheries and aquaculture, agriculture and parts of the coal sector (training aid, risk capital, R&D&I, aid for disadvantaged and disabled workers and environmental aid might be applied in certain circumstances, subject to the GBER conditions). Regional aid in the steel, shipbuilding and synthetic fibres sector, and regional aid schemes targeted at specific sectors of economic activity are also excluded. It does not apply to export related activities or to prefer use of domestic over imported goods. It does not apply to ad hoc aid to large undertakings (this exclusion does not concern regional investment and employment aid).

Concepts

There are 26 GBER categories. Measures which comply with the conditions and criteria as set within the Regulation will benefit from an exemption to the notification requirement. Aid givers are therefore free to implement them without additional Commission's assessment.

The GBER sets individual aid ceilings for each category of measure. It will be applicable to aid measures set below the ceilings prescribed. (Table 1.1 below sets out the ceilings of each category).

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

Aid is only allowed if it has an **incentive effect**. The GBER provides different criteria for the verification of the incentive effect with ranging complexity: (i) for certain types of measures, incentive effect is presumed; (ii) for SMEs, the incentive effect is present if the application for aid was submitted prior to the start of the project; (iii) and for large enterprises, in addition to the above, the Member State would have had to verify basic conditions of the documentation.

Cumulation of different measures of the GBER is possible as long as they concern different 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 applicable under GBER.

Type of aid measure	Aid Intensity	Maximum allowable aid amount
Regional investment and employment aid (available in assisted areas only), (Art. 13) (large, medium and small enterprises)	Regional aid intensity under the respective regional aid map; AND + 20 percentage points for small enterprises; +10 percentage points for medium enterprises (except Large Investment Projects and transport, different intensities also apply to agriculture)	Aid less than 75% of maximum aid for investment with eligible costs of 100 m EUR
Aid for newly created small enterprises (Art. 14)	107(3)(a) regions: 35% first three years after creation of an undertaking 25% two years thereafter 107(3)(c) regions: 25% first three years after creation of an undertaking 15% two years afterwards	2 m EUR per undertaking in 107(3)(a) region 1 m EUR per undertaking in 107(3)(c) region Please note that the annual amounts of aid per undertaking should not exceed 33% of the above aid amounts
SME investment and employment aid (available outside assisted areas) (Art.15) For investment in the processing and marketing of agricultural products	20% for small enterprises 10% for medium enterprises 75% in outermost regions 65% in smaller Aegean Islands 50% in 107(3)(a) regions 40% in all other regions	7.5 m EUR per undertaking per Project 7.5 m EUR per undertaking per project
Aid for small enterprises newly created by female entrepreneurs (Art. 16)	15% for the first five years	1 m EUR per undertaking (max 33% of that per annum)
Aid for consultancy in favour of SMEs (Art. 26)	50%	2 m EUR per undertaking per project
Aid for SME participation in fairs (Art 27)	50%	2 m EUR per undertaking per project
Risk capital aid (Art. 29)	NA	1.5 m EUR per target undertaking per 12 months
Research and development aid (Art. 31)	large enterprises: fundamental research: 100% industrial research: 50% experimental development: 25% medium enterprises: industrial research:60% experimental development: 35% small enterprises: industrial research: 70% experimental development: 45% +15 percentage points (up to 80%)	fundamental research: 20 m. EUR industrial research: 10 m EUR others: 7.5 m EUR per undertaking per project 2x if EUREKA

	total) if two or more cooperate	
Aid for technical feasibility studies (Art. 32)	SMEs: 75% for industrial research studies, 50% for experimental development studies; large enterprises: 65% for industrial research studies, 40% for experimental development studies	fundamental research: 20 m EUR industrial research: 10 m EUR others: 7.5 m EUR per undertaking per project 2x if EUREKA
Aid for industrial property rights costs for SMEs (Art. 33)	fundamental research: 100% industrial research: 50% experimental development: 25%	5 m EUR per undertaking per project
Aid for young innovative enterprises (Art. 35)	N/A	1 m EUR outside assisted areas 1.5 m EUR in 107(3)(a) regions 1.25 m EUR in 107(3)(c) regions
Aid for innovation advisory services and for innovation support services for SMEs (Art. 36)	75% unless a national or European certification	EUR 200 000 per undertaking within 3 years
Aid for the loan of highly qualified personnel (Art. 37)	50% per undertaking, for 3 years, per person borrowed	NA
Training aid (Art. 39)	25% specific training 60% general training +10 percentage points for disabled/disadvantaged workers +20 percentage points for small enterprise +10 percentage points for medium enterprise 100% for maritime transport	2m EUR per training project
Aid for recruitment of disadvantaged workers in the form of wage subsidies (Art. 40)	50%	5m EUR per undertaking per year
Aid for employment of disabled workers in the form of wage subsidies (Art. 41)	75%	10m EUR per undertaking per year
Aid for compensating the additional costs of employing disabled workers (Art. 42)	100%	10 m EUR per undertaking per year
Aid for investment to go beyond Community standards for environmental protection or increase the level of environmental protection in the absence of Community standards (Art. 18)	Large enterprises: 35% Medium enterprises: 45% Small enterprises: 55%	7.5 m EUR per undertaking per project

Aid for acquisition of transport vehicles which go beyond Community environmental protection standards (Art. 19)	Large enterprises: 35% Medium enterprises: 45% Small enterprises: 55%	7.5 m EUR per undertaking per project
Aid for early adaptation to future environmental standards for SMEs (Art. 20)	If implementation more than 3 years before standard enters into force: 15% for small enterprises 10% for medium enterpr. If implementation between 1-3 years before standard enters into force: 10% for small enterprises	7.5 m EUR per undertaking per project
Aid for investment in energy saving measures (Art. 21)	Two ways to calculate: 1. extra investment costs (net): Large enterprise: 60% Medium enterprise: 70% Small enterprise: 80% 2. extra investment costs (gross): Large enterprise: 20% Medium enterprise: 30% Small enterprise: 40%	7.5 m EUR per undertaking per project Two
Aid for investment in high efficiency cogeneration (Art. 22)	Large enterprises: 45% Medium enterprises: 55% Small enterprises: 65%	7.5 m EUR per undertaking per Project Two
Aid for investment in the promotion of energy from renewable energy (Art. 23)	Large enterprises: 45% Medium enterprises: 55% Small enterprises: 65%	7.5 m EUR per undertaking per Project Two
Aid for environmental studies (Art. 24)	Large enterprises: 50% Medium enterprises: 60% Small enterprises: 70%	NA
Aid for the environment, in the form of tax reductions (Art. 25)	no intensity (only allowed if at least Community minimum paid, for maximum period of 10 years)	NA

Important points to note when using the GBER

Chapter I of the GBER

Administrators have to ensure that their measures are in compliance with Chapter I of the GBER which sets out the common provisions on Scope, thresholds, definitions, monitoring and administrative requirements.

Definition of SMEs¹⁸

Please ensure you apply the Commission's definition of SME when determining the size of an undertaking

¹⁸ See the SME definition on the Commission's website
http://ec.europa.eu/competition/state_aid/legislation/horizontal.html

State Aid Notification Interactive System (SANI)

It is now a compulsory requirement of the Commission that all Summary Forms for informing the Commission about respective GBER measures have to be submitted via the use of SANI. Please see the information on our website in respect of SANI.

Reporting requirements for block exemption schemes

There are clear signals that the Commission is now attaching a higher priority to the information and reporting requirements attached to the use of block exemption regulations in particular, and will be prepared to take action where these are not met. The Commission has embarked on stricter obligations on transparency and reporting as a trade off for more generous block exemption rules. Therefore we can expect:

- Much more active scrutiny of annual reports on schemes operated under block exemptions with follow up action from the Commission if these are late, incomplete or inaccurate
- More frequent 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

For granting bodies we believe this makes it even more important that:

- Staff are aware of State aid requirements and check out the detailed operating conditions that apply to specific aid schemes both at the design stage and after schemes have been approved or registered under block exemptions
- There is effective record keeping on aid schemes once implemented to ensure that the annual reporting exercise goes smoothly and to enable quick and full responses to any ad-hoc enquiries
- There is always someone in the organisation who has responsibility for ensuring ongoing compliance with State aid on a scheme by scheme basis.

Seek advice: Contact your devolved administration, State Aid Branch or equivalent before awarding aid under the Regulation as we can check the aid proposal before any aid is paid out and assist in ensuring compliance.

B) Frameworks and Guidelines Applying to Most Industry sectors

1) Aid to disadvantaged and disable workers

The Commission Communication provides guidance on the methodology for the detailed compatibility assessment of individually notifiable state aid in the form of wage subsidies. It is intended to explain the reasoning underlying the Commission decisions on the compatibility of these aid measures and thereby increasing transparency.

Measures that apply under the Communication

The guidance applies to measures in the form of wages subsidies for disadvantaged workers, severely disadvantages workers and disabled workers as defined in the Article 2 (18), (19) and (20) of the General Block Exemption Regulation (GBER).

Individual aid measures involving large aid amounts can entail a higher risk of distorting competition. Therefore, for such measures a notification remains necessary in order to assess whether the positive effects outweigh the negative effects.

Individual notification is required, whether granted ad hoc or on the basis of a scheme, where the grant equivalent of aid exceeds €5 million per undertaking per year for the employment of disadvantaged workers and severely disadvantaged workers and €10 million per undertaking per year for the employment of disabled workers.

This section provides a summary of the Commission's compatibility assessment based on the balancing test. However aid administrators -grantors are reminded to ensure that they read the full text of the applicable guidelines as this summary does not represent the full text.

The Balancing Test

The core element of the refined – economic approach adopted by the Commission is the balancing test. The idea behind the test is that the Commission will examine the existence of a positive effect of the aid as well as the appropriateness, proportionality and incentive effect of the aid to ensure that these positive effects are balanced against negative effects the aid might bring about.

In order to do this the Commission would look at the purpose of the state aid and the design of the aid measure by asking the following questions:

- Is there a market failure that needs to be corrected?
- Is state aid the appropriate instrument to remedy the problem?
- Does it induce a change of behaviour in the aid recipient?
- Is it proportionate?

What aid administrators need to consider for measures that fall under the guidance on aid for the employment of disadvantaged and disabled workers

- **What is the objective of common interest that can be addressed by State aid in the form of wages subsidies:** certain categories of worker experience particular difficulty in finding jobs, because employers consider them to be less productive. This perceived or real lower productivity may be due to lack of recent experience in employment or to a permanent disability. As a consequence, disadvantages or disabled workers are likely to be excluded from the labour market unless employments are offered compensation for their employment. State aid in form of wage subsidies might help such workers to enter the labour market or to remain in their post by covering extra costs induced by their perceived or real lower productivity.
- **Demonstrating the existence of an incentive effect and the necessity of the aid:** Aid administrators have to demonstrate that the aid leads to a net increase in the number of disadvantaged or disabled employees in the undertaking concerned. State aid cannot be used to replace subsidised workers whose subsidies have ended and who have consequently been dismissed. In order to demonstrate that there is an incentive effect, aid administrators should demonstrate that the wage subsidy is paid for a disadvantaged or disabled worker in a firm, where the recruitment would have not occurred without the aid.
- **Ensuring the proportionality of the aid:** Aid administrators must demonstrate that the aid is necessary and the amount is kept to the minimum in order to achieve the objective of the aid. Aid administrators should provide evidence that the aid amount does not exceed net additional costs of employing the targeted categories of disadvantaged or disabled workers compared to the costs of employing not disadvantaged or not disabled workers. In any case, aid intensities must never exceed those defined in Article 40 and 41 of the GBER. Eligible cost, to which aid intensities are to be applied, must be calculated following Articles 40 and 41 of the GBER.
- **Ensuring that their aid measures may not lead to distortions of competition:** In spite of the existence of positive effects of the aid, large aid measures bear a higher risk of distorting competition. The extent of distortions of competition can vary depending on the aid design and the characteristic of the markets affected. Aid in the form of wage subsidies may lead to a substitution effect, where jobs given to one category of workers merely reduce the jobs available for other categories. Furthermore, wage subsidies may enable firms with otherwise poor commercial prospects to enter a market or introduce new products to the detriment of more efficient rivals. The availability of wage subsidies will also affect a firm's decision to leave a market where it is already operating. Subsidised wages could reduce the size of losses and enable a firm to stay in the market for longer – with possible negative effects on more efficient rivals.

2) Training Aid Guidelines (TAG)

Any individual aid, whether granted ad hoc or on the basis of a scheme, with a grant equivalent exceeding €2 million per training project will be subject to individual notification to the Commission and will therefore be assessed under the TAG. Ad-hoc training aid to a large firm below the above threshold will also be subject to a notification requirement.

In accordance with the Commission's 2005 State Aid Action Plan (SAAP) in which it was agreed that a more refined economic-based approach will be developed in assessing state aid measures, the Commission has set out in the TAG the criteria it will apply for the assessment of measures subject to a notification requirement. It is useful to note that the criteria as set out in the TAG will not be applied mechanically. The level of the Commission's assessment and kind of information it may require will be proportional to the risk of distortion on competition and the scope of the analysis will depend on the nature of the case.

This section provides a summary of the Commission's compatibility assessment based on the balancing test. However aid administrators/grantors are reminded to ensure that they read the full text of the applicable guidelines as this summary does not represent the full text.

The Balancing Test

The core element of the refined –economic approach adopted by the Commission is the balancing test. The idea behind the test is that the Commission will examine the existence of a positive effect of the aid as well as the appropriateness, proportionality and incentive effect of the aid to ensure that these positive effects are balanced against negative effects the aid might bring about.

In order to do this the Commission would look at the purpose of the state aid and the design of the aid measure by asking the following questions:

- Is there a market failure that needs to be corrected?
- Is state aid the appropriate instrument to remedy the problem?
- Does it induce a change of behaviour in the aid recipient?
- Is it proportionate?

What Aid administrators need to consider for measures that fall under TAG

- **Demonstrating the existence of an incentive effect and the necessity of aid:** Aid administrators should provide information demonstrating that a company's training activity has increased, either in quantity or in quality, as a consequence of the aid (incentive effect).
- **Demonstrating the existence of the market failure being addressed:** Training aid must address market failures that arise from an underinvestment in training. Underinvestment in training may occur for a number of reasons. Firms may refrain from training their workforce because they are risk averse or suffer from financial constraints. Furthermore, firms may be concerned that training provided to their workers will not pay off because employees will leave

- **Ensuring the proportionality of the aid:** The Commission will take into account the calculation method to determine the costs eligible for state support and whether it is in line with Article 39 of the General Block Exemption Regulation. Eligible costs need to be limited to the costs arising from training activities which would not be undertaken without the aid. Aid grantors should also provide evidence that the aid amount does not exceed the part of the eligible costs that cannot be appropriated by the company (i.e. the part of the extra costs of the training that the company cannot recover by benefiting directly from the skills acquired by its employees during the training). In any case, aid intensities must never exceed those defined in Article 39 of the General Block Exemption Regulation and will be applied to the above-mentioned eligible costs¹⁹.
- **Ensuring that their aid measures may not lead to distortions of competition:** In spite of the existence of positive effects of training aid, measures involving high aid amounts bear a higher risk of distorting competition. The extent of distortions of competition can vary depending on the aid design and the characteristic of the markets affected.

In some cases, reduced production costs resulting from the aid could affect a firm's decision to enter a market or not. State aid could also enable a product to stay in the market for longer – with possible negative effects on non-aided rivals.

¹⁹ Relevant examples include the following cases: C 35/2007, Training aid to Volvo Cars in Gent (OJ C 265, 07.11.2007), N 227/2006 – DHL Leipzig Halle, (OJ C 48, 02.03.2007), C 14/2006, Training aid to General Motors Antwerp, (OJ C 210, 01.09.2006).

3) Regional Aid Guidelines 2007-2013²⁰

Article 107(3)(a) and (c) of the Treaty 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.

Aim of regional aid - to promote the development of the less-favoured regions:

- mainly by supporting initial investment, or
- in exceptional cases, by providing operating aid.

Exceptions and special sectoral rules

The Guidelines do not apply to:

- the production of agricultural and fisheries products listed in Annex I to the EC Treaty
- the coal industry.
- the steel industry
- synthetic fibres;
- companies in difficulty²¹

Special rules apply to:

- transport, shipbuilding, and processing and marketing of agricultural products listed in Annex I to the EC Treaty

The Commission considers that aid to financial services (banking and insurance) brings little advantage in terms of regional development.

Concepts

Two categories of eligible regions:

- **Article 107(3)(a) regions:** These are regions 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).
- **Article 107(3)(c) areas:** These are problem areas defined on the basis of national indicators proposed by the Member States.

²⁰ Commission Guidelines on National Regional Aid for 2007-2013 (2006/C54/08: See Rules and Regulations on the State Aid website)

²¹ See section 2.1 of the Rescue and Restructuring Guidelines for definition of a company in difficulty <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC1001%2801%29:EN:NOT>

Initial investment: Investment in fixed capital relating to the setting up of a new establishment, the extension of an existing establishment, or the starting up of an activity involving a fundamental change in the product or production process of an existing establishment. Replacement Investments which do not meet these conditions are not eligible for regional aid.

Large investment projects: investment projects with eligible investment costs of at least €50 million (eligible investment costs are defined below).

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

AID FOR INITIAL INVESTMENT

The investment / jobs created by the aid should be maintained in the region concerned for 5 years (3 years for SMEs)

Eligible Costs

Aid for initial investment can be calculated as a percentage of the investment’s value or as a percentage of the wage-cost of the jobs linked to the initial investment.

- **Investment:** material investment (land, buildings, plant/machinery) and a limited amount of immaterial investment (expenditure entailed by technology transfer). Expenditure on transport equipment in the transport sector is not eligible. Consultancy costs and preparatory studies may also be eligible for SMEs.
- **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).

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 107(3)(a) region < 75%GDP & “statistical effect” region*	30%	40%	50%
Article 107(3)(c) “statistical effect” region	20%	30%	40%
Other Article 107(3)(c) region – higher cap	15%	25%	35%
Other Article 107(3)(c) region – lower cap	10%	20%	30%

10% may be added to the regional aid intensity for medium sized companies, 20% for small companies.

Please see regional aid map linked below to see the aid intensities which apply in the UK.

Please note that a sliding scale applies to the aid intensity which applies to **large investment projects**. Aid for eligible costs of up to €50M may receive aid at the full aid intensity, eligible costs of €50-100M qualifies for an aid intensity of half of the normal aid intensity and any eligible costs over €100M can only be supported at 34% of the normal aid intensity.

OPERATING AID

Operating aid may be granted in Article 107(3)(a) regions, and only if all of the following conditions are satisfied:

- It is justified in terms of its contribution to regional development;
- Its level is proportional to the handicaps it seeks to alleviate;
- It is limited in time and progressively reduced.

The onus is on the Member State to demonstrate the existence and importance of these handicaps.

AID SCHEMES FOR NEWLY CREATED SMES

Up to €3M per enterprise in article 107(3)(a) regions and €2M in article 107(3)(c) regions. Annual aid per enterprise not to exceed 33% of these amounts.

Eligible Costs include legal, advisory, consultancy, administration costs directly related to creation of the enterprise, and the following costs to the extent that they are incurred over the first 5 years after the creation of the enterprise: finance costs (not exceeding the reference rate), rental for production equipment, utilities, taxes, administrative charges, depreciation and wage costs.

Aid intensities for newly created SMEs are as follows:

	Years 1-3	Years 4-5
Article 107(3)(a)	35%	25%
Article 107(3)(c)	25%	15%

5% may be added in 107(3)(a) areas with GDP of <60% of the EU average, low population density regions, and small islands and isolated communities.

TRANSPORT AID

Aid to offset additional transport costs can be provided only in the outermost regions and in low population density areas qualifying for regional aid.

Cumulation

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

- Where assistance is granted under several regional aid schemes;
- Whether the aid comes from local, regional, national or Community sources.

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.

FURTHER INFORMATION

Regional Aid Guidelines 2007-2013

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:054:0013:0044:EN:PDF>

Regional Aid and UK Assisted Areas

<http://www.bis.gov.uk/policies/regional-economic-development/assisted-areas>

4) Aid for Research and Development and Innovation

The current State aid framework²² for R&D and Innovation came into force on 1 January 2007. It allows Member States to fund business research and innovation projects, high-tech start-up companies, and research infrastructure and services. .

a) 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. This still applies where organisations also provide economic services such as commercial research and consultancy, as long as there is no cross subsidy between the core and commercial activities and commercial services are charged at market rates
- public funding of university/other non-profit research organisations' licensing and spin-off creation (up to the point they are spun out) where these activities are in-house and income generated is reinvested in the organisations' core public activities
- university/non-profit research organisation participation in business research projects on commercial terms: e.g. where the organisation is paid market rates by business partners for its share of the project work or results, or is given ongoing 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, there should be no State aid
- where universities/research organisations or other not for profit intermediaries provide publicly funded services to businesses (for example, 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.

Sectors for which special rules apply

- **Agriculture & fisheries, shipbuilding and transport:** higher aid intensities and/or different definitions of fundable R&D and innovation projects apply in some cases.
- the framework does not allow aid to undertakings in difficulty as defined under state aid rules on rescue and restructuring.

²² Community Framework for State aid for Research and Development and Innovation 30.12.06 OJ C http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/c_323/c_32320061230en00010026.pdf

b) Allowable state aid

i) R&D project aid -The framework allows state aid for the following levels of R&D:

- **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 extends to the development of commercially usable prototypes and pilot projects where they would be too expensive to produce only for experimental purposes; where there is subsequent commercial use of the prototype any revenue generated has to be deducted from eligible costs. This category does not cover routine or periodic changes to produces and services.
- **technical feasibility studies** preparatory to industrial research and experimental development.

Eligible costs

- costs of staff, instruments and equipment, and land and premises, to the extent that these are related to the project;
- costs of contractual research, knowledge or patents, and consultancy services bought in for the project;
- additional overheads and operating expenses such as the costs of materials and supplies where directly incurred by the project;
- SMEs only: legal, translation and other costs that result from obtaining and validating patents and other IP rights.

Aid Intensities – Project Aid

	Small enterprise	Medium enterprise	Large enterprise
Fundamental research	100%	100%	100%
Technical feasibility study preparatory to industrial research	75%	75%	65%
Industrial research	70%	60%	50%
Industrial research projects involving collaborations* or where the results will be disseminated	80%	75%	65%
Technical feasibility study leading to experimental development	50%	50%	40%
Experimental development	45%	35%	25%
Experimental development projects involving collaborations*	60%	50%	40%

* collaborations between businesses and research organisations, or business to business collaborations which are cross border or involve at least one SME, provided that no one business partner carries more than 70% of the project costs

Notes

- Member states must demonstrate the incentive effect of all aid to large businesses (e.g. that the project would not go ahead at all, or to the same scale or timetable without the aid)
- Where aid is given in the form of a repayable loan higher aid intensity ceilings are permitted.- Large grants are subject to separate clearance and in-depth scrutiny requirements. The trigger points apply per grant per recipient and vary according to the level of R&D involved: €20 million for fundamental research projects, €10 million for industrial research projects, and €7.5 million for experimental development projects.

ii) Aid for young innovative enterprises (YIE): aid to hi-tech start up companies provided that:

- they are small enterprises in existence for less than 6 years at the time of the aid grant and
- they are engaged in products, services or processes which are technologically new or substantially in advance of the norm, and carry a risk of technological failure, and this has been evaluated by an independent expert, or their R&D

expenses are or have recently been at least 15% of total operating expenses, as certified by an external auditor

YIE aid is allowable up to €1 million per recipient (€1.5 million in Article 107(3)(a) areas and €1.25 million in Article 107(3)(c) areas) but may only be given once.

YIE aid may not be cumulated with other state aids within three years of being granted, apart from risk capital or other forms of R&D and Innovation aid.

iii) Aid for process and organisational innovation in services: allows aid for non-technological innovation projects other than routine improvements. Organisational innovation projects must be related to the exploitation of ICT. Large companies are only eligible for grants as part of collaborative projects with SMEs; the SMEs must bear at least 30% of project costs.

Aid intensities: small enterprises 35%, medium enterprises 25%, large enterprises in collaboration with SMEs 15%

Eligible costs: as for R&D project aid, but for organisational innovation projects instrument/equipment costs must be related to ICT to qualify.

Note: Member States will be required to demonstrate the incentive effect of all grants/schemes in this category. Any aid over €5 million per recipient per project will require separate clearance and in-depth scrutiny.

iv) aid for innovation advisory and support services: allows support to SMEs in the form of technical facilities or advisory services. Aid may be given either as a direct grant to SMEs or in the form of funding to non-profit intermediaries to provide innovation services at prices below the level a market based operator would require in order to gain commercial rates of return. The conditions are that:

- the advisory and support services covered by this category are: management consulting, technological assistance, technology transfer services, training, consultancy for acquisition, protection and trade in Intellectual Property Rights and for licensing agreements, consultancy on the use of standards, office space, data banks, technical libraries, market research, laboratories, quality labelling, testing and certification.
- beneficiaries must be SMEs and the aid to them must not exceed €200 thousand over any three year period
- the service provider must have national or European certification; if not, the aid may not cover more than 75% of eligible costs
- services must be priced at market rates or, where the provider is a non-profit body, at a price that reflects full costs and a reasonable margin
- where this aid is delivered via funding to non-profit organisations, member states must ensure full transparency over the costs of the service as well as

the price paid by service users, to ensure that the aid received can be measured and monitored

v) aid for the loan of highly qualified personnel: allows funding of staff secondments from universities/research organisations and large firms to SMEs provided that:

- the secondees are researchers, engineers, designers or marketing managers with tertiary education and at least 5 years relevant professional experience (this can include doctoral training) who will take on newly created functions in the SME, and who will have the right to return to their original employers after the secondment
- aid must not extend beyond three years per undertaking/secondee or exceed 50% of eligible costs, which are: all personnel costs of borrowing and employing the secondee, including the costs of using a recruitment agency, as well as a mobility allowance.

vi) aid for innovation clusters: these are defined in the framework 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.

This category allows the **commercial organisation** responsible for running a cluster to be granted investment and operating aid for **training and research facilities, open access research laboratories and testing facilities and broadband infrastructure.**

Conditions:

- investment aid is allowed up to an aid intensity of 15%/25%/35% for large/medium/small enterprises. There are further bonuses for facilities located in Article 107(3)(a) areas, outermost regions and statistical effect areas. The eligible costs are land, buildings, machinery and equipment.
- operating aid must normally be limited to a period of five years and must either be degressive (100% in the first year falling to zero by the end of year five) or must be limited to 50% throughout the period. The eligible costs are the personnel and administrative costs involved in marketing of the cluster to recruit new companies, management of the cluster's open access facilities.
- when notifying cluster aid, Member States must provide an analysis of the technological specialisation of the cluster, existing regional potential, existing research capacity, presence of similar clusters in the Community and potential market volumes of the activities in the cluster

Note: where Member States are funding **not-for-profit research organisations** to provide innovation infrastructure this is subject to the rules in section 3.1 of the Framework (see also final bullet in section 1 above). This means that they may be funded up to 100% without being recipients of State aid themselves, provided they

can demonstrate that they are not receiving any undue benefit themselves as intermediaries and that any aid to end users of the facility complies with State aid rules.

c) Reporting and transparency

In addition to the headline figures provided by Member States annually on all one-off aids and aid schemes, Member States are required to submit **detailed annual reports** on any aids approved under the R&D and Innovation Framework disclosing the names of beneficiaries, the aid amount per beneficiary, the aid intensity and the sectors where the aided projects are undertaken (in the case of fiscal aid schemes, beneficiaries need only be named where they receive aid over €200,000). Cluster aid reports must also cover the cluster's activity and success in promoting R&D and Innovation. **These reports will be published by the Commission.**

There are additional requirements to send **information sheets** to the Commission on large aids above €3 million. **These sheets will also be published by the Commission.**

Finally Member States are now required to publish details of R&D and Innovation aid schemes online.

Approval processes

The General Block Exemption Regulation (GBER) introduced in August 2008 provides for some categories of R&D&I to proceed through a fast track notification system. See section on GBER.

Aids not covered by the general block exemption will require prior approval by the Commission. The Framework applies in-depth scrutiny to notifications involving larger or more sensitive aids.

5) State Aid for Environmental Protection

Scope

The Environmental Guidelines²³ cover aid for actions designed to remedy or prevent damage to our physical surroundings or natural resources or to encourage the efficient use of these resources including energy saving measures and the use of renewable energy sources.

The Guidelines do not apply to:

- Aid for R&D&I in the environmental field (normal R&D&I rules apply) or the design and manufacture of environmentally friendly products
- Aid for training in the environmental field (normal training rules apply).
- Aid for consultancy services for SMEs (normal SME rules apply).
- Carbon Capture and Storage (but this could be approved directly under Article 107(3)(b) or (c) of the Treaty).
- Infrastructure for district heating, except where this leads to a reduction in energy input to the beneficiary (but this could be approved directly under Article 107(3)(c) of the Treaty).
- Air, road, railway, inland waterway and maritime transport infrastructure.
- Stranded Costs.
- Undertakings involved in the processing and marketing of fisheries products and to primary agricultural production, except where the agricultural and fisheries guidelines do not apply.

Key Concepts

Eligible Costs - Only those costs of projects which contribute purely to the achievement of an environmental gain are eligible for environmental aid. Because of this overriding principle it is extremely rare for all project costs to count towards the eligible costs.

In most cases, the Commission will look to subtract the costs of an “equivalent” non-environmental project and any operating costs and benefits accrued usually over the first 5 years of the project (e.g. saved fuel and energy costs resulting from use of waste heat).

Investment Aid – Is used to reduce the fixed costs of a more environmentally friendly investment.

²³ Community Guidelines on State Aid for Environmental Protection 2008/C 82/01 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:082:0001:0033:EN:PDF>

Operating Aid – Is used to enable more environmentally friendly producers to sell their products at market price.

In many cases, the environmental aid provisions in the General Block Exemption Regulation offer the option of a simpler eligible cost calculation than the Environmental guidelines, based only on additional investment costs and not operating costs, however the aid intensity and maximum aid available is generally lower.

Aid Measures

The following measures are possible under the Environmental Aid Guidelines.

* indicates measures that are also available in simplified form under the General Block Exemption Regulation – see separate General Block Exemption Regulation guidance note for details.

Activity	Maximum Aid Intensity
<p>Aid for investment for undertakings which go beyond Community standards or increase the level of environmental protection in the absence of Community standards.*</p> <p>Not for adopted standards which are not yet in force.</p>	<p>50% (+10/20% for SMEs)</p> <p>60% (+10/20% for SMEs) for eco-innovation product</p> <p>100% if intensity decided by competitive bidding process</p>
<p>Aid for investment in the acquisition of new transport vehicles which go beyond Community standards or which increase the level of environmental protection in the absence of Community standards.*</p> <p>Aid may be granted for retrofitting of existing means of transport.</p>	<p>50% (+10/20% for SMEs)</p> <p>60% (+10/20% for SMEs) for eco-innovation</p> <p>100% if intensity decided by competitive bidding process</p>
<p>Aid for investment to early adaptation to future Community standards.*</p>	<p>15% (+5/10% for SMEs) if more than 3 years early</p> <p>10% (+5/10% for SMEs) if 1-3 years early</p>
<p>Aid for Environmental Studies*</p> <p>Includes aid for preparatory studies where the investment does not go ahead, but must be linked to an energy saving, renewables or other investments which would be covered by the guidelines.</p>	<p>50% (+10/20% for SMEs) of the costs of the study</p>

<p>Investment Aid for energy saving*</p> <p>Strictly limited to the extra costs directly related to energy saving and to a level of energy saving higher than Community standards are both identified.</p> <p>Operating costs and benefits to be taken into account for 3-5 years, depending on EU ETS participation and size of beneficiary.</p>	<p>60% (+10/20% for SMEs)</p> <p>100% if intensity decided by competitive bidding process</p>
<p>Operating aid for energy saving for up to 5 years.</p>	<p>Where aid decreases in a linear fashion, up to 100% may be granted in year 1, falling to 0 by the end of year 5.</p> <p>OR</p> <p>50% for 5 years where aid does not decrease in a linear fashion.</p> <p>Any investment aid granted to the plant must be deducted.</p>
<p>Investment aid for renewable energy sources.*</p> <p>Eligible costs calculated by comparison to a conventional power (often a CCGT) or heat plant.</p> <p>Aid for sustainable biofuels only.</p>	<p>60% (+10/20% for SMEs)</p> <p>100% if competitive bidding process</p>
<p>Operating aid for renewable energy sources.</p> <p>Aid for biomass may go beyond plant depreciation where costs borne remain higher than market price for energy.</p>	<p>100% of extra production costs until plant is fully depreciated.</p> <p>OR</p> <p>Where aid decreases in a linear fashion, up to 100% may be granted in year 1, falling to 0 by the end of year 5.</p> <p>OR</p>

	<p>50% for 5 years where aid does not decrease in a linear fashion.</p> <p>Any investment aid granted in respect of the same project must be deducted.</p>
<p>Operating aid for renewable energy sources in the form of market mechanisms (e.g. green certificates and tenders).</p>	n/a
<p>Investment aid for cogeneration.*</p> <p>Can include improvement of an existing unit.</p> <p>New or upgraded unit must be 'high-efficiency cogeneration' and make primary energy savings compared to separate production.</p>	<p>60% (+10/20% for SMEs)</p> <p>100% if competitive bidding process</p>
<p>Operating aid for cogeneration.</p> <p>New or upgraded unit must be 'high-efficiency cogeneration' and make primary energy savings compared to separate production.</p>	<p>As for renewables operating aid (including market mechanisms).</p>
<p>Energy-efficient district heating.</p> <p>The combined operation of heat (and electricity) generation and distribution must result in energy savings OR the investment must result in the use and distribution of waste heat for district heating purposes.</p> <p>District heating infrastructure is not covered by the guidelines, but can be considered for approval directly under the Treaty.</p>	<p>50% (+10/20% for SMEs)</p> <p>100% if competitive bidding process</p> <p>(Or use renewables / cogeneration provisions if appropriate).</p>
<p>Aid for waste management including, under certain conditions, activities of re-utilization, recycling and recovery.</p> <p>Must be aimed at reducing pollution generated by other undertakings. NOT for pollution generated by the beneficiary of the aid, or to relieve polluters from a burden that should be borne by them under community law or a</p>	<p>50% (+10/20% for SMEs)</p>

<p>normal company cost.</p> <p>Investment must go beyond state of the art or use conventional technologies in an innovative manner.</p> <p>Materials to be treated would otherwise be disposed of or be treated in a less environmentally friendly manner.</p> <p>Investment must not result in increased demand for materials to be recycled without increasing collection of those materials.</p>	
<p>Aid for the remediation of contaminated sites.</p> <p>If the person responsible for the pollution is not identified or cannot be made to bear the cost, the person responsible for the rehabilitation of the land may receive aid.</p> <p>Eligible costs are equal to the cost of the remediation less the increase in the value of the land.</p>	<p>100% (but may not exceed total expenditure incurred)</p>
<p>Aid for the relocation of undertakings (for environmental reasons under the Habitats or Seveso II directives).</p> <p>The undertaking must comply with the strictest environmental standards applicable in its new location.</p>	<p>50% (+10/20% for SMEs)</p>
<p>Aid involved in tradable permit schemes.</p> <p>Schemes must provide for achievement of environmental objectives beyond mandatory Community standards.</p> <p>Allocation must be carried out in a transparent and objective way with no favouring of new entrants and no undue barriers to entry.</p>	<p>n/a</p>

<p>Aid in the form of reductions of or exemptions from environmental taxes</p> <p>Allowed where the tax reduction contributes indirectly to an improvement of the level of environmental protection (by relieving some undertakings of substantial increases in production costs).</p> <p>The reductions or exemptions must not undermine the general objective pursued by the tax.</p>	<p>Taxes which are subject to Community level harmonisation must be at least equal to minimum level set out in the relevant legislation.</p> <p>Tax must be necessary and proportional.</p>
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Notification and Approval

All of the aid measures in the environmental guidelines must be notified to and approved by the Commission before they can be implemented. The length of time this can take varies, but even simple measures should be expected to take 6-8 months.

When will a case be subject to a detailed assessment?

Higher amounts of aid entail a greater risk of distorting competition and are therefore be subject to a detailed assessment. This does not mean that the aid will be prohibited, but does mean that the Commission will check more thoroughly that the aid is necessary and contributes to environmental protection without creating undue distortions of competition. In particular, aid at the following levels will be subject to the detailed assessment and balancing test described in section 5 of the Environmental Guidelines.

1. Investment aid: over €7.5 million for one undertaking or where there is a duty to notify under the General Block Exemption Regulation
2. Operating aid for energy saving: where the aid amount exceeds €5 million per undertaking for five years
3. Operating aid for the production of renewable electricity and/or heat: where the resulting electricity generation capacity exceeds 125 MW
4. Operating aid for the production of biofuel: where the resulting production exceeds 150,000 t per year
5. Operating aid for cogeneration: where resulting electricity capacity exceeds 200 MW. Aid for the production of heat from cogeneration will be assessed in the context of notification based on electricity capacity.
6. Aid for renewables based on external costs avoided.

A separate tax assessment applies to fiscal measures.

The following key points will be considered by the Commission to determine whether the positive impacts of the aid measure in terms of environmental protection outweigh the negative effects on competition and trade.

- Is the aid aimed at a well defined objective of common interest? (i.e. what contribution does it make towards environmental protection?).
- Is the aid well designed to deliver this objective and is State aid the most appropriate instrument? (e.g. could regulation have the same effect?)
- Is there an incentive effect? (i.e. does the aid actually change the behaviour of the undertakings?)
- Is the aid proportional? (i.e. has the amount of aid been minimised or could the same effect be achieved with less aid or distortion?)
- Are distortions of competition and effect on trade limited?

6) Risk Capital/Venture Capital Aid

Aim

The aim of the Communication²⁴ is to set out the criteria under which the Commission may authorise risk capital measures, even if they are not compatible with other State aid regulations, guidelines or frameworks.

Scope

Measures principally designed to provide or promote risk capital or equity financing to enterprises in their start-up and development phases.

Where State aid is present:

When assessing risk capital funds, the Commission will examine whether State aid is present at each of the following levels:

- **Aid to the investors:** Where a measure allows investors to participate in a risk capital fund on terms more favourable than if they had undertaken this investment in absence of the measure, then those investors may receive State aid. The same applies where the investors participate in a fund on terms more favourable than public investors.
- **Aid to an intermediary vehicle or fund and/or its manager:** Normally, the fund is merely a vehicle for the transfer of aid, rather than being an aid beneficiary itself. However, in certain cases (notably existing funds with several investors), the fund may have the character of an independent enterprise.
- **Aid to the enterprises invested in:** The main test is whether investment in the enterprise has been made on terms acceptable to a normal economic operator in a market economy – the “market economy investor principle” (MEIP).

The above principle may also be applied to the investors in a fund. Where both public and private sector investors operate on the same basis with respect to both risks and rewards, it is likely that private sector investors may not be in receipt of aid. However, investors whose risks have been reduced, or whose rewards have been increased by a measure, may be said no longer to be such operators.

Criteria for assessing risk capital measures

Assessment of risk capital measures on the basis of existing State aid regulations, frameworks or guidelines:

- In some cases, risk capital investments can be approved under existing regulations, frameworks or guidelines. This would be the case if the equity capital invested in a company is provided in conformity with the provisions laid

²⁴ http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/c_194/c_19420060818en00020021.pdf

down in one of these regulations, frameworks or guidelines (eg the de minimis or SME aid regulation).

- In most cases, this will not be possible for a number of reasons (eg the difficulty of establishing a grant equivalent of equity capital provided to companies, the difficulty of establishing a link with eligible costs, the fact that no State aid regulation, framework or guideline provides any basis for measures providing aid at the level of the investors).

In cases where risk capital measures cannot be cleared on the basis of existing State aid regulations, frameworks or guidelines, the Commission will assess the compatibility of State aid measures, primarily in relation to the existence and scope of the market failure.

In cases where it is envisaged that the measure will provide investments beyond the terms of the guidelines in particular with respect to the maximum investment of €1.5m pa per target SME, or where the private sector investment would drop below 50% (30% in assisted areas), clear evidence should be provided of the market failure and the risk of crowding out private investment. It should also be noted that in practice, the Commission will want to see some evidence of a market failure in all cases irrespective of investment size or private sector involvement.

The Commission will regard the following characteristics as positive elements in its evaluation:

- Existence and evidence of a market failure
- Decisions to invest are profit-driven. This would be the case if there is a link between the financial performance of the fund and the remuneration of those responsible for the investment decisions. This will enable the reach the view that the measure encourages private risk capital investment.
- Aid is limited to the minimum necessary. An open call for tender for the establishment of any preferential terms given to investors and an open tender for managers would be considered positive elements.
- Presence of an investment committee.
- Presence of business angels.

Seek Advice: If you are intending to lend to a public body sector and you are unsure about how to apply the rules, please contact either the Treasury or the BIS' State Aid Branch for further advice.

7) Aid for Rescuing & Restructuring Firms in Difficulty

Scope

The Guidelines²⁵ cover aid for the rescuing and/or restructuring of individual companies in difficulty.

- They do not apply to steel and coal mining. Specific rules apply for restructuring in the agricultural sector.
- **A company in difficulty** is a company that is unable to stem losses which without outside intervention by public authorities will almost certainly condemn it to go out of business in the short or medium term.
- **Rescue aid** is temporary assistance. It should make it possible to keep a company in difficulty afloat for the time needed to work out a restructuring or liquidation plan and/or for the length of time needed by the Commission or the competent national authorities to reach a decision on that plan (maximum six months).
- **Restructuring aid** is based on a feasible, coherent and far-reaching plan to restore a firm's long-term viability.
- A firm is not eligible for rescue or restructuring aid for the first three years following the start of operations in the relevant field of activity.

Conditions:

Rescue aid has to meet the following conditions:

- Consists of liquidity help in the form of loan guarantees or loans bearing normal commercial interest rates;
- Restricted to the amount needed to keep the firm in business (the guidelines contain a formula);
- Only for the time needed (max. 6 months) to devise the recovery plan;
- Be warranted on the grounds of social difficulties and have no adverse effects on the industrial situation in other Member States;
- Should be a one-off operation – one time last time principle;
- Rescue aid can be given before notification but notification must be made immediately afterwards.

Restructuring aid can be granted only if the following criteria are met:

- A viable restructuring/recovery programme is submitted to the Commission;
- Measures are taken to avoid undue distortions of competition (eg appropriate reduction of capacity);
- Aid is limited to the minimum needed for the implementation of the restructuring measures. **Beneficiaries have to make a significant contribution** - 50% for large companies, 40% for medium companies and 25% for small companies;
- The company has to implement the restructuring plan in full;
- Restructuring aid can be granted once only (one time, last time principle);

²⁵ Summary of Community Guidelines on State aid for rescuing and restructuring firms in difficulty (Official Journal No C288, 9.10.1999, p.2) http://europa.eu.int/eur-lex/pri/en/oj/dat/1999/c_288/c_28819991009en00020018.pdf

- Strict monitoring and annual reporting is required.

Notification

- Aid in conformity with the de minimis regulation does not need to be notified;
- For large firms, individual notification of each award of rescue and restructuring aid is required;
- For SMEs, rescue and restructuring aid (up to €10,000,000) can be granted on the basis of notified and approved aid schemes.

8) Services of general economic interest (SGEI)

What is a Service of General Economic Interest?

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. The Commission and Court only have a role in determining manifest error. In general they tend to include such things as gas, electricity, telecoms, public service broadcasting and public transport but this is not an exhaustive list. An SGEI is usually a service which the market does not provide or does not provide to the extent or at the quality which the state requires AND is in the general and not the particular interest. This means that the beneficiaries of the service should be the community at large and not a specific sector of industry. Thus an incubator service for SMEs would not be an SGEI as it benefits a particular type of undertaking. It is perhaps helpful to think that in entrusting an undertaking with an SGEI you are asking it to do something which is beyond the normal call of duty. BIS would strongly recommend that public authorities consult our separate guidance on funding public services²⁶.

What could not be supported under an SGEI umbrella?

The range of services which count as SGEI is very wide and is very much a matter for the Member State. However as a guide the sort of activities which would not qualify for support under SGEI would be capital grants to manufacturing plant to buy new equipment, R&D aid, rescue and restructuring aid, general capital investment or regional aid. These types of aid should be given under the normal guidelines and frameworks.

Aid or not aid

The UK takes the view that a contract for services at market rate – i.e. a supplier is being asked to give his best price for doing the service - does not lead to aid. However, if the procurement route is being used to hold a competition for subsidy - i.e. the supplier is being asked how little subsidy he will require to perform the service - then there is likely to be aid and the following guidance is relevant.

State Aid Treatment of SGEI

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, in order to ensure legal certainty the Commission have therefore come forward with two texts: a Decision exempting from notification small SGEIs below a certain threshold and a Framework for everything else. The Decision also exempts all compensation for social housing and hospitals regardless of the amount.

DECISION - please refer to the full text of this decision as the following is only a summary.

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

²⁶ <http://www.bis.gov.uk/files/file53292.pdf>

What is exempt from notification?

Please note that this is only an exemption from the need to notify it is NOT an exemption from state aid rules. This compensation is still aid.

Annual aid for SGEI of less than 30 million euros given to undertakings whose annual turnover in the last two financial years was less than 100 million euros. Aid of any amount for hospitals and social housing – provided that they are carrying out SGEIs.

Compensation for air or maritime links to islands with annual traffic in the last two financial years of less than 300,000 passengers

SGEI compensation for ports and airports where annual average traffic in the last two financial years does not exceed 1 million passengers in the case of airports and 300 000 passengers in the case of ports.

The Decision does NOT apply to broadcasting or to land transport. These exemption criteria only apply when giving compensation for SGEI – they do not apply if for example you are giving capital investment aid.

What are my responsibilities if I am giving aid?

You must define the Service of General Economic Interest that you want to be provided. The Commission recommend that you consult on the terms of the SGEI and in particular seek the views of consumers – this is only a recommendation and not an absolute requirement. The definition should be as precise as possible.

You must entrust the SGEI to the recipient undertaking properly. Entrustment may be made by means of primary legislation, a contract or a Ministerial letter. However it is done it must set out the following:

- The nature and the duration of the public service obligations;
- The undertakings and the territory concerned;
- The nature of any exclusive or special rights assigned to the undertaking;
- The parameters for calculating, controlling and reviewing the compensation
- The arrangements for avoiding and repaying any overcompensation.

Ideally this entrustment document should be made publicly available. Competitors should be able to see exactly who you are funding, where, why and how much you are giving. If competitors are unaware of the terms of your entrustment they may complain to the Commission that you have given unnotified aid.

As entrustment requires a more detailed approach than has been the norm in most Member States the Commission will give Member States a year to bring their entrustment procedures into line. However you should really start as soon as possible and not wait until the deadline.

You must ensure that there is no over compensation – i.e. you must pay only the amount needed to discharge the service but allowing the undertaking to make a reasonable profit – reasonable profit is defined in article 5.4. Basically this involves a rate of return on capital based on the amount of risk that the undertaking is exposed

to in carrying out the service. This should not exceed the normal profit levels of companies in the sector. SGEI funding is only supposed to ensure that the entrusted company is no worse off because it is carried out the service – it should not be significantly better off.

The costs that you can compensate are set out in Article 5.2 .You must make regular checks to ensure that there is no over-compensation. This is not fire and forget aid. However if there is over compensation and it is less than 10% of the annual compensation this can be carried over. If the undertaking also carries out non-SGEI activities the aid giver can decide that any profit from these should go towards the financing of the SGEI.

Member States have one year to bring their current practice into line with the requirements of the block exemption on over-compensation.

You must keep detailed records of the aid given. The UK will have to provide reports every three years on the working of the block exemption. These records are the only way of proving that you have complied with the block exemption and have not given illegal aid. They must be kept for ten years and the Commission can ask to see them at any time. In addition, if an undertaking is performing SGEI and non-SGEI tasks there must be separate accounts for both activities.

FRAMEWORK - please refer to the full text of the framework as the following is only a summary

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

All compensation which does not meet either the terms of Altmark or the Decision must be notified to and approved by the Commission. The Framework sets out criteria the Commission will apply in clearing aid. These criteria are in the main not new – they are merely a formulation of the way the Commission has always applied Article 86(2).

What are the conditions for compatibility?

Definition of SGEI

As with the Decision you must have given the undertaking a public service task to perform. Again this should be precisely defined and the Commission recommend that you consult on the definition.

Entrustment

There must also be an entrustment document, which again can either take the form of primary legislation, contract or Ministerial letter. The entrustment document must contain the information listed above.

Compensation

The compensation must not exceed what is necessary for the undertaking to perform the service – allowing for a reasonable profit. Compensation must not be used by the undertaking to cross subsidise non-SGEI activity. (However it is perfectly legitimate to

insist that profits from non-SGEI activities are used to reduce funding needed for SGEI). A full description of the costs that can and cannot be met are given in article 13 of the Framework. The definition of reasonable profit is the same as for the Decision and is set out in Article 15.

Over-compensation

Aid givers must also check regularly for over-compensation. Aid givers need to be sure that the amount of aid is still needed and if not the parameters of aid must be redrawn. However over-compensation of less than 10% of the total aid can be carried over to the following financial year providing of course that there is a suitable adjustment in the amount of aid awarded that year. Over-compensation of more than 10% must be repaid unless there are very exceptional circumstances. An undertaking cannot keep this money on the grounds that it is being used for a purpose which the Commission would normally approve – for example environmental protection or R&D. If the company is to be given money for this purpose it must be notified to and approved by the Commission in advance in the usual manner.

Other Points

Undertakings receiving aid and who also engage in other non-SGEI services must keep separate accounts for SGEI and non-SGEI activities as per the Transparency Directive.

9) The Financial Transparency Directive

Summary²⁷

The Financial Transparency Directive has created a reporting regime to aid the European's Commission's investigative capabilities in the area of illegal state aid. Collectively²⁸, the Directives oblige public bodies (whose annual turnover – amongst other things – is at least €40m) engaged in commercial activities, to inform the Commission of the support they receive from public authorities. In addition, bodies (whether private or public) similarly engaged in commercial activities and in receipt of certain services from public authorities, are obliged to ensure that their management accounts are sufficiently separate to distinguish between these activities. Finally public bodies engaged in the manufacturing sector with an annual turnover of at least €250m are required to supply details of their annual reports and accounts to the Commission on an annual basis.

Purpose

The purpose of the FTD is to underpin the state aid regime by requiring such aid to be made transparent. 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.

UK legislation

The UK has implemented the Transparency Directive via the Financial Transparency (EC Directive) Regulations 2009²⁹.

²⁷ Link to the Commission's website to the Transparency of Public undertaking
http://ec.europa.eu/comm/competition/state_aid/legislation/transparency.html

²⁸ The original Directive 80/723/EEC/, has been amended several times, the latest being Directive 2006/111/EC

²⁹ http://www.England-legislation.hms.gov.uk/si/si2009/pdf/uksi_20092331_en.pdf

C. Specific Sectors Rules

The Treaty has additional provisions for certain sectors. The Commission has adopted frameworks and rules defining its approach to State aid in particular industries³⁰.

1) 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 32 and 36 and the Community Guidelines for State aid in the agricultural sector, adopted by the Commission in 2000 and in the Community Guidelines for the examination of State aid to fisheries and aquaculture³¹. The Department for Environment, Food and Rural Affairs (DEFRA) provides advice on the rules applying in these sectors.

2) Broadband

The Community Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks were introduced in September 2009. 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 (NGA).

State aid arises when public funds are granted to an investor to enable them implement a broadband network, which in most cases are chosen following a tender. The use of a tender ensures that aid is kept to a minimum but often includes the rights to operate a network, thereby enabling the successful bidder to conduct a commercial activity on terms which would not be otherwise available on the market. Indirect beneficiaries include third party operators that obtain wholesale access to the infrastructure and business users who get connectivity under terms that would not apply without state intervention.

Aid to support broadband may be considered compatible with the Treaty where the market does not provide sufficient coverage or the access conditions are not adequate – either at the level of first generation broadband or next generation access. In assessing compatibility the Commission makes a distinction between the types of areas that may be targeted depending on the existing level of connectivity. Notifications are required to classify areas to be covered into “white, “grey” and “black” areas according to the current level of provision – where white indicates no coverage, grey indicates one existing network and black indicates that more than one network exists. Different levels of assessment apply to each category with conditions for support in white areas easier to satisfy than those in grey or black areas where the market already provides a service and the potential for distortion of competition greater.

³⁰ These are obtainable on the Commission’s website
http://ec.europa.eu/comm/competition/state_aid/legislation/specific_rules.html

³¹ These are obtainable on the Commission’s website
http://ec.europa.eu/agriculture/stateaid/leg_en.htm -
http://ec.europa.eu/fisheries/contracts_and_funding/state_aid/index_en.htm

The Guidelines set down a number of design features required in all notified measures in order to limit distortions of competition. These include a detailed mapping and coverage analysis, an open tender process, acceptance of most economically advantageous offer, technology neutrality, use of existing infrastructure where possible, wholesale access to third parties, a benchmark pricing exercise and a clawback mechanism to avoid over-compensation.

Next Generation Access (NGA)

The Guidelines define NGA as mainly fibre based or advanced upgraded cable networks intended to replace copper based or current cable networks. Additional considerations apply to the assessment process which takes into account both the current level of NGA provision and the existing first generation provision.

The Guidelines seek additional measures to limit distortions of competition including effective wholesale access for seven years and the provision of access to passive infrastructure (ducts or street cabinets).

3) Cinema Film and TV Programme Production

The Commission's Communication³² sets out the criteria (which have been extended until 2012) against which it assesses State aid to cinema and TV programme production:

- the State aid must be directed to a product the content of which is cultural according to verifiable national criteria;
- the producer must be free to spend at least 20% of the film budget in other Member States without suffering a reduction in the State aid provided. ("Territorialisation" of up to 80% of the production budget is therefore permitted);
- the intensity of the State aid must not exceed 50% of the production budget. "Difficult and low budget films", defined according to national parameters, are not subject to this limit.
- State aid supplements for specific filmmaking activities (e.g. post-production) are not permitted.

No support may be provided from the EU Structural Funds for cinema and TV programme production.

As with other forms of State aid, the aid must also respect the "general legality" principle - that is, it must not be subject to conditions that are contrary to provisions of the Treaty other than those relating to State aid. In particular

- the State aid must not be reserved exclusively for nationals of the Member State concerned, require beneficiaries to have the status of a national undertaking established under national commercial law, or require workers of foreign companies providing filmmaking services to comply with national labour standards.

³² http://ec.europa.eu/competition/state_aid/legislation/specific_rules.html

- where the State aid is financed by a parafiscal charge and benefits national producers either solely or to a greater extent than competitors in other Member States, then that charge must not be levied on imported production, and national production must not enjoy a lower rate of charge when exported.

Undertakings in the film and TV programme production sector may benefit from regional State aid or other State aid frameworks that apply across industry generally, for example, SMEs, research and development, training or employment.

4) Sensitive Sectors

The Commission has adopted special rules for these sectors which have experienced particularly severe economic problems and 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)
- synthetic fibres sector
- shipbuilding.

For these sectors, the State aid rules are, in general, more restrictive than the rules applying to other industries. In most cases, the possibility of aid for investment leading to increased production capacity is severely limited or even prohibited. In some cases, aid is allowed only on condition that it is accompanied by capacity reductions. In almost all of these sectors, 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).

a) State aid to the coal industry

Under Council Regulation (EC) No 1407/2002 of 23 July 2002 on State aid to the coal industry (applicable until 31 December 2010)³³, the Commission **may** approve the following categories of State aid:

- State aid for the **reduction of activity** - to cover current production losses of production units with a planned closure date no later than 31 December 2007.
- State aid for **access to coal reserves**: production units may receive either aid for initial investment (for up to 30% of the initial investment costs of projects that contribute to maintaining access to coal reserves and ensure the viability of the units concerned, with a final payment no later than 31 December 2010), or current production aid (for current production losses of production units whose operations form part of a plan for access to coal reserves and where the aid contributes to maintaining access to coal reserves), but not both.
- State aid for **exceptional costs** (for certain costs resulting from the rationalisation and restructuring of the coal industry that are not related to current production (“inherited liabilities”)).

³³ http://ec.europa.eu/energy/coal/state_aid/state_aid_en.htm

Undertakings in the coal industry may benefit from State aid for research and technological development, the environment and training. No other State aid may be granted. **NOTE:** R&D and environment aid require you to obtain advance approval from the Commission. Training aid that complies with the training block exemption regulation is exempt from this requirement – unless for very large projects.

b) State aid to shipbuilding, ship repairing and ship conversion

Commission Framework 2003/C317/06³⁴ has been prolonged until 31 December 2011. The Commission's objective in the Framework is to simplify the application of state aid rules to shipbuilding (thereby removing the differences between the rules applicable to the shipbuilding sector and other industrial sectors in the sphere of state aid) by extending horizontal provisions to the shipbuilding sector.

Key aspects:

- **application of horizontal provisions**

Horizontal measures relating to training aid; de minimis; SME; rescue and restructuring; environmental and R&D may also apply to shipbuilding.

- **specific provisions**

- **aid to R&D and innovation** – the maximum aid intensity has increased from 10% to 20 %.

- **closure aid** – certain eligible costs arising from the total or partial closure of shipbuilding, ship repair or ship conversion yards are allowable. Undertakings receiving partial closure aid must not have benefited from rescue or restructuring aid in the past 10 years.

- **employment aid** – aid granted for the creation of employment as well as recruitment in shipbuilding; repair and conversion may be allowable if it complies with the rules set out in Commission Regulation (EC) No 2204/2002 of December 2002 on aid for employment.

- **export credits** - aid to shipbuilding in the form of government supported credit facilities granted to national or non-national ship-owners or third parties for the building or conversion of vessels may be allowable if it complies with the terms of the 1998 OECD Arrangement on Guidelines for Officially Supported Export Credits for Ships and with its Sector Understanding on Export Credits for Ships (including any future amendments).

- **development aid** – Aid related to shipbuilding and conversion granted, as development assistance to a developing country, may be allowable if it complies with the terms laid down in the OECD Arrangements on Guidelines for Officially Supported Export Credits and its Sector Understanding on Export Credits.

³⁴ [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52003XC1230\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52003XC1230(01):EN:NOT)

- **regional aid** – in Art 107(3)(a) regions, aid for investment is now limited to 22.5% of eligible costs. In Art 107 (3)(c) regions, aid for investment is now limited to 12.5% of eligible costs.

- **notification** – All plans for new aid (whether ad hoc or under scheme) must be notified.

- **cumulation** – Any combination of state aid or other funding should not exceed the aid intensity stipulated in the new Framework.

c) State aid to the steel industry

Under the Commission's 2002 Communication on a multilateral framework on regional aid for large investment projects³⁵ no investment by the steel industry is eligible for regional investment State aid during the life of the framework (until 31 December 2009).

The Communication on rescue and restructuring aid for the steel sector, indicates that the Commission regards the following **closure aid** as compatible with the common market:

- State aid to cover not more than 50% of payments to workers made redundant or accepting early retirement
- State aid to steel firms that permanently cease production of steel products of an amount not exceeding the residual book value of the plant to be closed

and that it regards **rescue aid and restructuring aid** to the steel industry as **incompatible** with the common market.

Undertakings in the steel industry may benefit from State aid for training, employment, environmental protection, and research and development as well as from “de minimis” aid.

Small and medium-sized enterprises in the steel industry may benefit from aid for SMEs at aid rates of up to 15% and 7.5% respectively under the Commission “block exemption” regulation for SMEs, but not from the higher rates otherwise available in Article 107(3)(a) areas and Article 107(3)(c) areas. The Commission will not approve large grants for investment not exempted by that regulation.

d) State aid to the synthetic fibres sector

Under the Commission's Regional Aid Rules³⁶, no investment in the synthetic fibres sector is eligible for regional investment State aid.

³⁵ [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002XC0319\(03\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002XC0319(03):EN:HTML)

³⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:054:0013:0044:EN:PDF>

5) Transport

In the road transport sector, most general State aid rules apply, although there are exceptions (e.g. transport equipment is not eligible for aid; the de minimis regulation has restrictions in relation to transport; the job creation part of the employment block exemption does not apply to transport).

General State aid rules do not apply in the other transport sectors (rail, air, inland waterways and maritime transport). Article 73 of the Treaty includes provisions on State aid to transport³⁷. The Department for Transport provides advice on the State aid rules for transport.

³⁷ Link to the Commission's website for details of the rules applicable
http://ec.europa.eu/transport/stateaid/index_en.htm

D. Other Communications

1) HMG's Commercial Lending: Guidance on Lending to Sponsored Bodies

Concept

In order to regulate commercial lending rates for public sector bodies the Treasury has issued a Dear Accounting Officer's (DAO)³⁸ letter to all Government Departments to ensure that Commercial Lending is in line with the Commission's rules.

However, please note that although the requirement is that Government should ideally not lend to financially unhealthy bodies and if it did to ensure that it followed the commission's guidelines regarding reference rates and that a credit rating should be obtained for companies borrowing, this does not apply to lending that is in compliance with approved schemes, for example under the Commission's Rescue and Restructuring guidelines.

2) State Aid in Sales of Land and Buildings by Public Authorities

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 authorities³⁹). If there has been a sufficiently, well-publicised, open and unconditional bidding procedure and the best offer is accepted, there would be no State aid involved in the transaction. If restrictions are placed on the use of the land, e.g. that the development must include the provision of social housing, this may reduce the value of the land but does not mean that the land is not sold at market value as long as the planning constraints are transparent and the best offer is accepted. If public land is sold at less than market value State aid will be involved and the difference between the market value and the sale price will constitute State aid.

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, usually under the regional aid guidelines in assisted areas or under the SME block exemption or de minimis regulation.

Land and property development / regeneration

There is no formal Commission framework as such for land and property regeneration, but there are several schemes in the UK which have either received Commission State aid approval, or which the Commission confirmed as not involving Article 107(1) State aid.

³⁸ <http://www.hm-treasury.gov.uk/media/698/21/6982130E-BCDC-D4B3-1C19D3292B571825.pdf>

³⁹ [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)

These are:

- Support for speculative developments
- Support for bespoke developments
- Historic environment regeneration scheme
- Support for remediation of derelict land
- Community Regeneration
- Environmental Regeneration
- Direct development

For further information and guidance about these schemes, please contact the Department for Communities and Local Government (DCLG). See the contact list on the website

3) Use of Structural Funds 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 (SF) are still considered a State resource as the national government has an influence in 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.

Many uses of the Structural Fund do not come within the scope of the State aid rules eg support for an infrastructure project of general public benefit that has been tendered. Where individual application of the Funds does involve State aid, the Managing Authority must ensure that the SF contribution as well as the other public funding complies with State aid rules.

4) Reference Rate

Another overriding principle the Commission applies is the use of a "reference rate" 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 State⁴⁰.

One should refer to the reference rate communication⁴¹ to determine the appropriate 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.

⁴⁰ http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html

⁴¹ [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)

5) The Temporary Framework

The Commission introduced a Temporary Framework⁴² for state aid measures to help address the financial and economic crisis in December 2008. This gave EU Member States greater flexibility to intervene in the market to provide support to financial institutions and other companies in the real economy affected by the crisis until the end of December 2010.

The UK put several framework schemes in place that enable public authorities to take advantage of the greater temporary flexibility afforded by the Framework.

December 2010 – Commission announces continuation of the temporary framework measures for the real economy

In December 2010, EU Competition Commissioner Joaquin Almunia announced the Continuation of both the Banking and real economy Temporary State Aid Frameworks - with amended conditions.. The UK had called for the real economy aid measures to come to an end. The Commission have been under pressure to extend the Framework beyond 2010 because of the continued effects of the crisis in some Member States.

The new framework is tougher, particularly for larger companies, and crucially the worst abuse (allowing failing companies to stay in the market without consequence), has been addressed. The extension is unlikely to make much practical difference to the UK.

As of January 2011, the temporary framework allows Member States to grant:

- aid in the form of loan guarantees
- aid in the form of subsidised interest rates
- aid in the form of an interest-rate reduction for investment loans related to products which significantly improve environmental protection

Compatible Limited Amount of Aid

The provision to provide a Compatible Limited Amount of Aid up to €500,000 per company is not included in the revised Temporary Framework. The new Framework provides a small concession which allows authorities to grant this type of aid in 2011 provided the application was submitted by 31/12/2010.

The European Commission has approved the UK application to use this facility - Aid SA 32110 (2010/N)⁴³

⁴² Link to Commission's website for Temporary framework [European Commission - Competition](#)

⁴³ Prolongation of UK framework 'small amounts of compatible aid' SA 32110 (2010/N)
http://ec.europa.eu/eu_law/state_aids/comp-2010/sa32110.pdf

PART IV - Which State Aid Rules Apply?

There are State aid guidelines relating to different types of aid. See Guidelines, Frameworks and Regulations for details of the most frequently used categories. For more detail refer to the Commission website or BIS' State Aid Branch <http://www.bis.gov.uk/policies/europe/state-aid>

Other points to remember

- Where a block exemption applies, the aid must comply with every condition stated in the block exemption regulation.
- Where notification to the Commission applies, you should create a State Aid notification using the State Aid Notification Interactive (SANI). Further guidance is set out in the Notification and Approval Procedures on the BIS' State Aid website
- Special rules apply in particular sectors: steel; coal; agriculture, fisheries, synthetic fibres, and transport. These take precedence over the guidelines and frameworks which apply across industry generally⁴⁴.
- Very large individual awards of aid for initial investment must still be notified even if the (national) aid scheme concerned has been approved.

⁴⁴ For details see the Commission's website

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

for further advice on these sectoral rules refer to State Aid Branch in BIS (or DEFRA for agriculture and fisheries and DfT for transport).

Glossary

Aid	Short for State aid or public aid to business.
EC	European Community
EC Treaty	The founding treaty of the European Community
EU	European Union
European Commission	The EU body which enforces State aid rules and generally controls and monitors State aid
European Union	An evolution from the European Community
General measure	A Member State aid or benefit which is available to all businesses / economic activities in the State - and is therefore not State aid in the Article 107(1) sense
GGE	Gross grant equivalent
Member State	A nation state member of the EU
NGE	Net grant equivalent
“No aid”, or “Not aid”	Jargon for “not State aid as specified in the EC Treaty Article 107(1)”. Therefore the State aid rules do not affect it.
Public aid	A useful term for aid to business which is not “State aid” in the EC Treaty sense
State aid	Specific concept of Member State aid to business set out in Article 107(1) of the EC Treaty as updated by the EU Treaty
State aid rules	The rules that apply to Article 107(1) State aid – set out in Treaty provisions, European Commission legal regulations, guidelines, frameworks, notices, directives, communications, and in interpretations by the European Court of Justice.
Treaty of Rome	Another name for the founding treaty of the EC

Disclaimer

We provide the information on this website to help public officials understand the State aid rules that may affect their proposals and plans for giving aid to industry.

Our goal is to keep this information timely and accurate. If errors are brought to our attention, we will try to correct them. However the information is:

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<http://www.bis.gov.uk/policies/europe/state-aid>

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