



## STATE AID: FREQUENTLY ASKED QUESTIONS

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# Withdrawn

This publication was withdrawn on 1 January 2021.

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

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Withdrawn

# Basic queries

## What is a State Aid?

When an authority, on the local or national level, grants public resources to selected ‘undertakings’ (entities which are engaged in economic activities), this is known as State Aid. State Aid has the potential to distort competition and negatively affect free competition and trade between EU Member States.

Article 107<sup>1</sup> (1) EC states: “Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market”

However in certain circumstances the Commission may be able to approve a State Aid if they deem it as compatible with the Treaty.

## What is an undertaking?

An undertaking is an entity which is engaged in economic activity. This means that it puts goods or services on a given market. The important thing is what the entity does, not its status. If it can be done for a profit or if someone could legitimately complain that the aid interferes with their business model it is likely to be an economic activity.

Thus a charity, a not for profit company or a Government Department can all be undertakings if they are involved in any economic activities.

## What are the governing rules of State Aid? Where can I find them?

The principal legislation is Articles 107 to 109 of the Functioning of the European Union. Article 42; Article 93; Article 106(2) are relevant in relation to agriculture and SGEI respectively.

The rules and their interpretation are developed by the Court of Justice of the European Union’s case law and Commission secondary legislation – Frameworks, Directives, Communications and Guidelines on how the Treaty articles apply to different forms of aid e.g. fiscal measures, and to aid for different purposes e.g. environmental protection or R&D&I.

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<sup>1</sup> Articles – new numbering

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

Some rules affect particular sectors e.g. there are special rules covering the motor vehicles, shipbuilding and steel industry.

Some rules cover aid for “horizontal” objectives, this means that they are not sectorally specific. Examples include aid for R&D, regional aid and aid for training.

Sectoral aid is considered to be more distortive than horizontal aid and when it is allowed there are more restrictions placed on it.<sup>2</sup>.

## How do I spot a State Aid?

Article 107(1) sets out four criteria which must be met for a State Aid to be present. You can determine whether your policy meets these criteria by asking yourself four questions:

- Does the aid favour certain undertakings or the production of certain goods?
- Is aid provided through State resources?
- Does the aid distort or threaten to distort competition?
- Does the aid affect trade between Member States?

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

Some basic myths to dispel:

Public funding and State Aid are not one and the same, i.e. public funding is **not enough** to determine that this funding is State Aid. A transfer of public funding is not enough to determine that this funding is a State Aid. All four tests must be met.

The beneficiary can be public or private or a Public Private Partnership (PPP).

The tests on trade and competition are very easily met. The beneficiary need not itself carry out trade between Member States. The issue is whether the **activity** it is engaged in, is traded between Member States, e.g. insurance; construction; banking. There are few activities which are not traded between Member States these days and which do not **affect competition**.

## Why must we comply with the State Aid rules? Why bother?

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

- aid payments and schemes can be suspended

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<sup>2</sup> For reference, see: the European Commission’s website [European Commission - Competition](#)

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

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

Open and fair competition is beneficial for both **consumers and businesses** as well as our long term economic growth.

## What is the logic behind the State Aid rules?

The basic reason for the existence of the State Aid rules is to ensure that aid does not distort competition in the Single Market. State Aid is one of the few remaining ways in which Member States can hold up liberalisation and protect companies from competition.

As sectors become open to competition, the State Aid rules start to become more important – this includes areas which have been the subject to State monopoly. Where as in the past, certain sectors were national in nature, they have increasingly become subject to cross-border competition - the coal, transport, financial services and broadcasting industries are examples.

**High amounts of aid** can of themselves be distortive. That is why the Lisbon Council Conclusions included a commitment to reduce overall levels of aid within the European Community. The rules also exist to **stop abuses of aid**.

For example: Celtic Energy complained under the State Aid rules that the massively subsidised German mines were using aid to undercut prices of anthracite on the UK market. The Commission investigated and found the aid had indeed distorted competition and ordered the German companies to repay the DM 20m back to the German State. The German government was also ordered to pay compensation to Celtic Energy.

## Is State Aid illegal?

There is a clear statement of principle under Articles 107 and 108 of the Treaty that any form of aid, whether provided directly by the State, or indirectly ‘through State resources’, is incompatible with the Common Market if it distorts or threatens to distort competition within the Community. However, not all State Aid is unlawful. The Commission may, as an exception permitted by the Treaty, formally approve aid measures within certain limits (depending on the size, sector and location of the beneficiary). These “limits” are detailed in the frameworks / guidelines / regulations referred to above.

## What is the Commission's role?

The Commission has sole competence to decide whether a State Aid measure is compatible with the Treaty (i.e. is permissible). This means that the Commission has the ultimate say in all State Aid cases and frameworks - subject to limited review by the Court of Justice of the European Union. Accordingly, the Commission (DG COMP) has considerable powers to monitor, control, and restrict the forms and levels of aid given by Member States to their industries. In particular, all State Aid measures must be approved by the Commission in advance of implementation.

## How long will the Commission take to approve State Aid?

We initially pre-notify the Commission and they aim to respond to this within two weeks. The length of the pre-notification period from here depends on the complexity of the case and the quality of our responses to the Commission's questions.

Once the pre-notification process is successful, the Commission will provide a preliminary assessment of the compatibility of the aid measure and if appropriate, its suitability for consideration under the simplified procedure. If the pre-notification process is not successful, the Commission will declare it to be closed.

When the prenotification period is complete, we formally notify. Under the regulation, the Commission has to take a decision within 2 months of a complete notification. However, it can take quite some time for a notification to be deemed complete. In practice the timetable is longer. **Allow at least 6-9 months** for approval for any cases that must be notified.

The Commission can start a further period of two months by asking for further information if they consider the notification is not "complete". (The further 2 month period only starts once the Commission receives the answers.) At the end of the final two-month period, the Commission may decide to approve, OR to open a second-stage formal investigation under Article 108(2) which adds can take up to 18 months.

## What happens if we break the State Aid rules?

Breaking the state aid rules has two meanings. It can mean notifying a scheme which goes beyond the terms of one of the Frameworks or Guidelines or it can mean giving aid illegally – without waiting for it to be approved by the Commission.

### **Breaking the recognised thresholds for particular Frameworks or Guidelines.**

It is always risky to go beyond the limits in Frameworks or Guidelines or to go beyond their terms. It is however sometimes possible to have aid approved which goes beyond these limits as long as there is clear evidence of market failure and that the Commission's balancing test (put in link to this) is met.

### **Giving Illegal Aid**

There are two primary scenarios which involve granting illegal aid (i.e. aid which has not been notified to and approved by the Commission.) which is then discovered by the Commission after it has been implemented;

1. Granting illegal aid which is later found to be compatible
2. Granting illegal aid which is later found to be incompatible

If the aid we granted is deemed to be incompatible with State Aid law, the consequences can be severe: the Commission can rule it subject to **recovery with interest** from the date granted.

Member States are obliged to recover illegal aid if ordered to do so by the Commission even if the recovery of aid means that recipient companies go bankrupt. Companies can also take the government / granting authority to court for damages against illegal aid recovered.

Even if the aid is subsequently found to be compatible with the Treaty the Commission **may suspend the scheme** until they have completed an investigation It is also possible for competitors to take the state to Court to claim damages for the period the aid was illegal – i.e. the period from granting to approval.

## **Can we get away with not complying? Why is it so important to abide by the rules?**

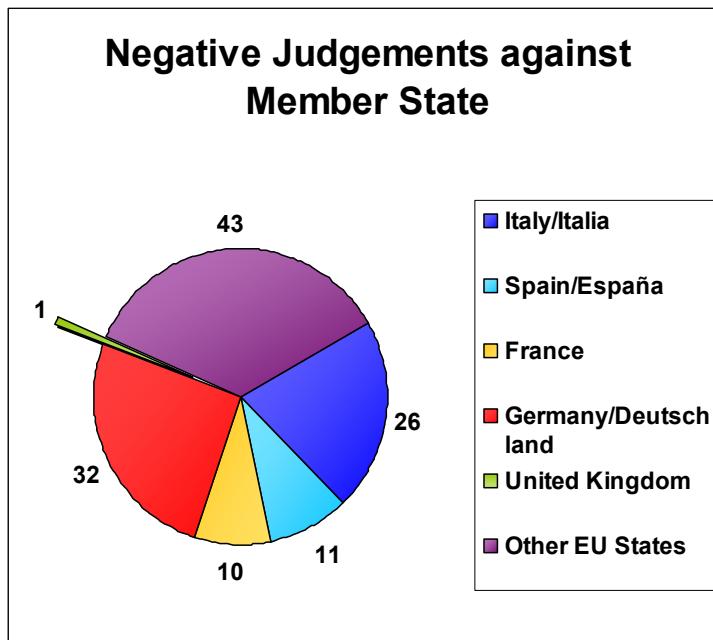
Ignoring the rules is **not** the right approach for critical reasons. To date in the UK almost all our notified aid cases have been approved and in nearly forty years, we have had only five negative decisions made against us. The UK has increased its credibility with the Commission and this can be useful when we have to argue a difficult case.

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

## **Don't other Member States get away with breaking State Aid rules anyway?**

The UK has an excellent record of State Aid compliance and only five negative judgements against us in over forty years. Our record compares favourably against other member states with similarly sized economies.

The pie chart below illustrates the total number of negative judgements against the five biggest spenders on State Aid in the EU between 2000 and 2010.



There is no evidence of any negative bias against the UK.

## What are State Aid Branch's general recommendations on State Aid?

**Seek advice early and think state aid first.** Build State Aid implications into your initial appraisal and reconsider the state aid implications as your thinking develops. Allow enough time for Commission clearance and be aware that the Commission may require changes to schemes which are notified to it. Be aware of the risks of implementing unapproved aid. Try to fit any proposals to an existing approved aid or the general block exemption.

## Detailed Queries

### What is an SGEI?

Services of General Economic Interest (SGEI)<sup>3</sup> are not defined in the Treaty and it is for individual Member States to define and there is no overarching EU definition.

In general, they are **services which the market does not provide** or does not provide to the extent or at the quality which the State desires and are in the general (i.e. of all citizens) interest and not the interest of a particular sector.

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<sup>3</sup> SGEI – European Commission's website [European Commission - Competition](http://European Commission - Competition)

SGEIs tend to include such things as gas, electricity, telecoms, public service broadcasting and public transport but this is not an exhaustive list (See the State Aid Guide and the new guidance from the Commission).<sup>4</sup>

## Is support for an SGEI caught by the State Aid rules?

Funding of SGEI is in principle caught by the State Aid rules which apply to state funding of economic activities. Article 106(2) is the normal means of approving aid to undertakings performing an SGEI. However if the support meets the exacting tests given in the Altmark judgement (See the [State Aid Guide](#)) it will not be a State Aid. These include whether there has been a tender for the aid and whether it is merely enough to cover the cost of performing the service with a reasonable profit.

If it does not meet the terms of Altmark then you can either take advantage of the General Block Exemption or notify the aid under the terms of the SGEI Framework. This is explained further in the section on SGEI in the State Aid Guide.

## What is an Article 108(2) investigation and what is the procedure?

If the Commission has doubts about the compatibility of an aid scheme which has either been notified to them or has otherwise been brought to their attention (e.g. by a complainant) they are obliged to open a full investigation under Article 108(2). This is a fairly lengthy procedure which can take up to 18 months in the case of notified aid and longer for unnotified aid.

The Commission will in the first instance write to the Member State outlining their doubts. The Member State will then have twenty working days to reply. The letter is then published in the Official Journal (OJ) with any commercially sensitive information removed and a short summary is given in all the official languages. It can take several months for letters to appear in the OJ as time is needed for translation. When the letter appears in the OJ third parties (including competitors and other Member States) can then submit comments – there is usually a one month deadline for such comments. The Member State sees all responses, although a correspondent can ask to remain anonymous. The Member State then has a further month to reply to Third Party comments. After this the Commission deliberates on all the information and may have bi-lateral meetings with the parties involved. At the end of the procedure the Commission will either decide that there is no aid involved, that the aid is compatible (possibly with conditions) or that it is incompatible. If incompatible aid has already been given this may result in the money having to be recovered. The procedure will then close (see the State Aid Approval Process Flow Chart).<sup>5</sup>

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<sup>4</sup> [Communication from the Commission – reform of the EU State aid rules on SGEI](#)

<sup>5</sup> <http://www.bis.gov.uk/assets/biscore/business-law/docs/state-aid/10-1154-state-aid-notification-process-flowchart.pdf>

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

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

However if there is reason to believe that there might be illegal aid and you consider that this aid is harming your commercial prospects then you should bring this to the attention of the Commission. Please see the complaints section of our website for further guidance. It is free to make a complaint<sup>6</sup> and the Commission is legally obliged to investigate all complaints. Contact the Commission using [the form on their website](#).

You may wish to obtain independent legal advice on the merits of your complaint or to assist you with the drafting of your complaint.

Please note that the State Aid team are not involved in the complaints process.

## **Can a firm receive aid under the general block exemption with de minimis aid at the same time without raising cumulation issues?**

Yes. However, if the de minimis aid is being given towards the same costs that are being supported under the general block exemption or notified aid scheme you must ensure that the total aid from all sources for the same would not exceed the maximum permitted aid intensity for that particular project under the general block exemption or notified scheme.

The total de minimis aid granted to any undertaking of any size must not exceed €200,000 over any period of three fiscal years (€100,000 for any undertakings active in the road transport sector). For cumulation purposes, only aid given under the de minimis regulation during the previous two fiscal years and the current fiscal year, counts towards the ceiling.

De minimis aid can be given by any public body so it is essential as part of the administrative arrangements for the de minimis regulation to ask the intended beneficiary to declare any de minimis aid from any source received in the last three years.

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

Before granting de minimis aid, officials must take the time to read and understand the regulation in order to satisfy themselves that they are in compliance with all the administrative requirements of the regulation, including ensuring the cumulation rules are observed and having a monitoring system in place.

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<sup>6</sup> [http://ec.europa.eu/competition/forms/intro\\_en.html](http://ec.europa.eu/competition/forms/intro_en.html)

For more information please see [BIS website on de minimis procedure](#).

## Who is responsible for abiding by the de minimis threshold?

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

## Is it ever justified to give unnotified aid?

There is always risk in giving unnotified aid. It is for the aid giver to consider whether there are good arguments to say that the measure does not meet all four tests of aid and whether the risk of this coming to the Commission's attention outweighs that of the project being delayed.

Any decision not to notify must be discussed with the state aid team in advance and you should also read the guidance. You should obtain advice from your own state aid experts and lawyers.

Remember, the Ministerial Code requires Ministers to act lawfully. Therefore you cannot advise any Minister to give unnotified aid unless there are good arguments that this is not caught by the rules.[\[B1\]](#)

It can sometimes also be justified to give rescue aid in advance of notification given the need to save a company. However, the Commission does not approve of this practice and where possible rescue aid should be notified in advance like other aid.

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

The first issue is to identify whether the SF itself is being used like a State Aid within the meaning of Article 107(1). If the answer is yes, the issue is to identify which State Aid frameworks apply to the activity to be supported - Regional aid? Training aid? R&D? - and hence what the State Aid ceiling and other conditions are.

Please see [Vademecum on State Aid rules](#) for a summary of the frameworks available.

Another issue to determine is whether there is any other public funding going towards the same project costs. If so, the manager should ascertain whether that other public funding is notified and approved aid or block exempted and may be able to make use of the same cover. If not, the whole project will either have to be notified and approved before it can be used with the SF money for a State Aid purpose, or designed to comply with the terms of the general block exemption.

If the **other** (non-SF) public money is approved or block exempted aid, the next step is to ensure that **all** the public money **plus** the SF contribution is within the relevant State Aid ceiling (usually the regional aid ceiling as the aid will be assistance towards an initial investment) and meets any other relevant State Aid conditions (such as any special requirements in the scheme approval or any special rules to certain industries, e.g. motor vehicles).

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

## What is the Commission reference rate? Is there Aid when I use the reference rate?

The Commission's 'reference rate' was put in place for Member States to be used as a proxy for the market rate. However, particularly in light of recent economic crisis and credit freeze, you should consider whether the reference rate genuinely reflects the rate which would be available to the beneficiary on the market. If you provide finance at better terms than would have been available on the market then there could still be aid to them, regardless of the reference rate.

Therefore the reference rate plus the appropriate margin based on the **credit rating of the company and collateral offered** as set out in [reference rate communication](#) is considered as a **minimum rate** rather than a definitive guide to the rate which should be used.

If you are unsure what the appropriate market rate is and how you could demonstrate this in the event of a challenge you may wish consider commissioning independent advice from a reputable source.

Please see our [guidance paper](#)<sup>7</sup> on a risk based approach to State Aid and policy making and the Commission's [current base rate](#).

## What exchange rate should I use?

The official Commission exchange rate applicable on the date the offer of de minimis funding is made (date of written offer) should be used. The rate is updated monthly and can be accessed [here](#).

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<sup>7</sup> Paper on risk based approach to State aid <http://www.bis.gov.uk/files/file32879.pdf>

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

No. On the contrary, notified and approved State Aid must respect the aid ceilings – otherwise the approval lapses and it would not have been approved in the first place. Approval is not unconditional. Commission approval for an aid scheme will only stand if the aid provided meets the terms of the approval, which in turn will reflect the terms of the relevant aid guidelines where these exist. **NOTE:** Even though de minimis aid only cumulates with other de minimis aid for the purposes of calculating the de minimis ceiling of €200,000, de minimis aid must be taken into account if given towards costs which are also being supported under a notified or block exempted scheme to ensure that the permitted aid intensity for the notified scheme is not exceeded.

This is in contrast to the State Aid measures in the **general block exemption** regulation which are exempt from prior notification – **so long as** all of the conditions in the regulation are met. The aid must comply with all the terms of the regulation, which will include aid ceilings and cumulation rules. You must also inform the Commission within 20 working days of granting the aid using the online notification system. The general block exemption regulation does not exempt very large sums – these require Commission approval. You have to provide regular reporting information to the Commission on the aid provided under the general block exemption terms, quickly comply with requests for more detailed requests for information and maintain records for ten years.

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

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

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

There still could be State Aid. In a nutshell, this could occur where an economic advantage is being conferred which the market would not provide.

The difficulty is in proving how a given **undertaking** has not received a State Aid by virtue of the public sector intervention in the first place.

This can most often be circumvented by going to open tender in choosing private partners for a project where benefits will be shared between the public and the private participants. Technically, because you go to open tender in selecting the private partners you get around the "distortion of competition" criterion of Article 107(1) in that all interested parties had a chance to bid for it. This should reduce the scope for an economic advantage being provided.

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

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

### 1. .Market Failure

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

### 2. Selecting a private partner(s)

In creating a Joint Venture Limited company, the public body should competitively select their private partners. This should be done through rigorous advertising, which outlines the criteria that need to be met by the partner(s). The purpose of this is to prevent selectivity towards particular partner(s), which could in turn improve their competitiveness in the market place. By the same reasoning, it might be sensible to have only a three / four year contract with the selected partner(s) and then undergo another open tender. This should minimise the potential to distort competition in favour of the initial partner(s) as the project grows. This open tendering exercise might also provide a better guide as to how much public money needs to be made available to make the project happen.

### 3. Generated income

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

### 4. Getting started

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

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

The State Aid rules are agnostic about the legal status of an undertaking. They only affect PPPs where the participation of the public partner provides a benefit to the private partner and/or the PPP as an entity provides a benefit to others.

## How to apply State Aid to culture and tourism projects?

There is no automatic exemption from the State Aid rules for aid for promoting culture; there is a derogation under Article 107 (3)(d)<sup>8</sup> of the Treaty which allows aid to be given for promoting culture as long as it is notified to the European Commission and the Commission has given its approval. Article 107(3)(d) could be used to notify a scheme where aid is given to a commercial undertaking to promote cultural objectives. There are no guidelines or frameworks relating to this derogation to help with the notification process (apart from the film guidelines). For the most part, culture and tourism projects have to be considered in the light of Commission decisions on previous cases. If you are unsure about whether your policy is State Aid, please [contact the State Aid branch](#).

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<sup>8</sup> Article 107 [EUR-Lex - 12008E107 - EN](http://EUR-Lex - 12008E107 - EN)

Withdrawn

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