

**BERR**

Department for Business  
Enterprise & Regulatory Reform

**UNIVERSITIES AND RESEARCH  
ORGANISATIONS ON THE EC STATE  
AID FRAMEWORK FOR R&D&I**

Guidance note

DECEMBER 2008

# **GUIDANCE NOTE FOR UNIVERSITIES AND RESEARCH ORGANISATIONS ON THE EC STATE AID FRAMEWORK FOR RESEARCH AND DEVELOPMENT AND INNOVATION**

## **A - INTRODUCTION**

1. This note has been developed to help Universities and Research Organisations to better understand the State aid issues involved in their activities.
2. State aid rules can be complex and compliance will depend on the precise details of a particular project or scheme but the following information may help to clarify the situation.

### **What is State Aid?**

3. State Aid rules are derived from the Treaty of Rome which states that aid is the use of state resources, or any public support with an economic value, which given selectively has the capacity to distort trade by favouring certain undertakings, or the production of certain goods, and which has the potential to affect trade between Member States. The UK Government supports state aid regulation as a means of ensuring a free and fair business environment in Europe.
4. Because State Aid is designed to regulate competitive market activity it does not generally impact upon public functions such as:

- blue sky fundamental research
- tertiary education

But where Universities become active in the placing of goods or services on a competitive market they need to understand and take account of State aid rules.

## **B - OPERATING OUTSIDE THE STATE AID RULES**

### **Not all State Aid is Illegal**

5. The first step in State aid analysis is to assess whether funding for an activity can be aid. This is ultimately a matter of law, but the law is not always clear so informal interpretation and an element of informed risk management is often necessary. The second step is to assess whether the aid is approved or approvable. This depends on the policy and practice of the European Commission in particular interpretation of its General Block Exemption Regulation (GBER) and R&D&I guidelines.

6. Generally State aid rules for activities in which Universities are likely to be engaged are relatively generous because the Commission recognises the valuable contribution they make to economic growth and the public function element often present in much of this work. However the closer Universities get to big business and fully competitive markets the more State Aid rules will tend to bite.

### **State Aid Policy and R&D&I**

7. The Commission's R&D&I State aid framework provides some guidance on where it thinks Universities can operate without giving rise to State aid at all. It then goes on to explain when State aid can be compatible with the Treaty (i.e. approvable) where the activity leads to additional R&D&I and where the distortion of competition is not considered to be contrary to the common EU interest. The framework sets out the conditions under which R&D&I aid may be compatible with the Treaty, including projects involving universities and research organisations.

8. **The Framework defines a Research Organisation (RO) as an entity, such as a university or research institute, irrespective of its legal status, whose primary goal is to conduct research and disseminate its results by way of teaching, publication or technology transfer. All profits must be reinvested in these activities and shareholders or members shall have no preferential access to the research capacities or to research results generated.**

9. Whether RO activities involve state aid will hinge on whether they are acting as an undertaking involved in an economic activity offering goods or services in a given market. The R&D&I framework divides RO activities into economic and non economic activities and sets out circumstances in which they may or may not be considered to involve aid.

10. In considering whether an activity entails State aid it is necessary to consider whether there is aid to a) the RO or one of its subsidiary or associated bodies b) end users (businesses).

### **Non economic activities - in which the RO will probably not be acting as an undertaking and which can be run on a no aid basis.**

11. Non-economic activities are those where the RO is performing a public function and is not placing goods or a service on a market. For there to be a "market" there must be an element of competitive supply, but this does not include academic competition. Universities compete fiercely for prestige and academic and research excellence but that does not create a market by itself. For that, there has to be an element of economic competition – competition to make money, where success will damage the business of a rival.

Non-economic activities will therefore include:

- Public financing of the primary activities of a RO including tertiary education, independent R&D and the dissemination of research results. The fact that Universities charge tuition fees does not change the fundamentally non-economic nature of their education remit.
- Technology transfer activities carried out by ROs, including licensing, spin-off creation, or other forms of management of knowledge created by ROs, provided they are of an internal nature and where all income generated is reinvested in the primary activities of the RO (“internal nature” is defined as a situation where the management of knowledge is conducted by the RO or a subsidiary or contracted to a third party on a commercial basis).
- Development of land and property for the University’s own use. This would cover teaching and research facilities including those which may eventually be used for joint research with private industry or for the supply of commercial services to industry, as long as these purposes are ancillary to the main public functions.

### **Economic Activities**

12. Economic activities are all those consisting of the placing of goods and services on a competitive market. This would include:
- the development (building) of land and property mainly for use by commercial organisations (which includes spin-out companies), including science parks, laboratories for rent and business incubation centres.
  - the renting out of infrastructure to commercial organisations, including payments for use of University research and conference facilities as well as payments for use of commercially designated land and buildings (i.e. in science parks or business incubators)
  - the provision of consultancy services to business or to Government
  - the provision of certification and testing services on a commercial basis e.g. to business
  - the provision of contract research services.
13. Where activities are “economic” there may be State aid present, but there is still a requirement for competition to be distorted and for an impact on intra Community trade. These tests are usually easily met, but there are some instances where they may not be met and where there will be no state aid. For example:

- where the RO is contracting with commercial organisations at a market price and there is no alternative commercial supplier of the services in question in the area. This would be the case for some incubation and contract research where, for example, the market is a local one (businesses will not travel far to be incubated and University spin offs will be particularly immobile). It can be tricky to ensure that a market price is being charged in these scenarios where there is no real commercial benchmark, but if aid is detected it could be argued it flows through to the recipient businesses rather than constituting aid at the level of the RO itself.
- where the RO is fulfilling a public contract which was let by competitive tender. In this scenario the RO is being paid a market price for the delivery of commercial services and there is no element of subsidy arising from the payments for these services. There would risk being a being State aid problem, however, if an RO was to cross subsidise such consultancy services using its core funding. Any fees quoted for such work should therefore include full recovery of costs.

### **How to avoid giving State Aid to Others**

14. ROs must not only consider whether their own “economic” activities might distort competition on service markets, they must also be careful not to use their own state funded status to offer direct or indirect State Aid to others. In fact in practice the European Commission is likely to be more interested in how Universities might channel state funding to big business than in minor distortion of property or consultancy service markets.
15. The basic principle is that ROs must deal with commercial organisations equally and on a fully commercial basis. Otherwise State aid may flow through the RO to the business.

### **Joint research projects**

16. The R&D&I Framework states that there will be no aid to the industrial partner/end user or the RO if one of the following conditions is met:
  - The undertaking(s) bears the full cost of the project; or
  - The results are widely disseminated and IP rights allocated to the RO; or
  - The RO receives compensation at market price for the IP rights which result from the activity of the RO and which are transferred to the participating undertakings; or
  - Where there is a contractual agreement between partners under which IP rights and access rights to results are allocated to the partners in a way which reflects their interests, work packages and financial contributions to the project.

17. If the conditions above are not met the Commission will consider the contribution of the RO to the research project to be aid to the undertakings (businesses).

18. Some of the other scenarios where ROs might be accused of forwarding aid to businesses might be as follows:

- Where the RO builds a new research facility in partnership with a business, which then secures preferential rights of usage in return. The terms of the collaboration need not necessarily result in State aid flowing through to the business but the more complex, long term and exclusive the partnership and the smaller the field of such potential strategic partners, the greater the risk that the deal will be seen as advantageous to the business, rather than purely commercial. ROs seeking such partnerships should advertise the opportunity widely and ensure that the choice of partner complies with EU public procurement norms to reduce risk. If, in practice only one company has the resources, technical expertise and geographical proximity to become the strategic partner, the RO must be very careful to ensure that the terms of the deal are fully commercial as they will not be tested by market competition. To reduce risk it would be prudent to employ independent consultants to verify appropriate terms.
- Where the RO builds an incubation centre in a locality where none existed before and rents it out at a loss (not recovering full costs of investment plus operating costs), it may be setting the prices for rents and consultancy services at the level the market can bear but this is not a commercial rate. The market would not have supplied the facility at all, so there is an element of State aid here, probably at the level of the users of the incubation centre; however it may be arguable that there is no impact on intra-community trade depending on whether the Centre will in practice affect the provision of other business services in the relevant geographic area.
- Where the RO provides support to its own spin-out companies after they have spun-out. As stated above, knowledge management activities on the part of the RO, including licensing, feasibility studies, market assessments prior to launch and even initial funding of spin-outs is not an economic activity as far as the RO is concerned because as yet there is no business receiving an advantage. However once the spin-out is formed, it will be a business and the terms on which it and its staff interact with the RO must be arms length and fully commercial in order not to contain State aid.

## **C - ALLOWABLE AID**

19. If a project cannot be operated on a no aid basis, in accordance with the circumstances described above, there may well be scope for it to proceed where it meets the conditions of the R&D&I Framework, the General Block Exemption Regulation (GBER) or the De Minimis Regulation as outlined below.

### **De Minimis Regulation**

20. The de minimis regulation sets a threshold of €200,000 below which the state aid rules can be considered not to apply. Funding granted to an undertaking for any purpose which does not exceed €200,000 over any period of three years is considered to be de-minimis and does not count as aid. However the ceiling applies to aid to a single recipient from all sources and so the aid provider must check for previous aid awards to the recipient and maintain records to ensure that permitted levels are not exceeded.

### **The R&D&I Framework**

21. The Framework sets out types of R&D&I activities that may be funded with aid together with eligible costs, permitted aid intensities and thresholds, which may be funded following Commission approval. **The General Block Exemption (GBER)** which took effect from 28 August 2008 brings parts of the Framework into a block exemption and provides for the automatic approval of certain types of aid through a system of formal registration. However large and more complex aid schemes will continue to require formal notification and Commission approval.

22. For aid to be compatible under the Framework or the GBER the funding organisation must demonstrate that it is both necessary and has an incentive effect i.e. that it will increase the level of R&D&I activity and that the activities would not otherwise be carried out. The aid should result in an increase to the size, scope and speed of a project.

### **Aid for R&D&I Projects**

23. Project aid provides for support for three categories of research:

- Fundamental Research: experimental or theoretical work undertaken to acquire new knowledge of phenomena and facts: without any practical application or use in view.
- Industrial Research: planned research designed to acquire new knowledge for developing new, or improving existing, products, processes or services.
- Experimental Development: acquiring, combining or shaping existing knowledge to produce plans or designs for new altered or improved products, processes or services.

### **Eligible Costs:**

- Personnel costs.
- Costs of instruments and equipment to the extent and for the period used for the project, based on the depreciation cost applicable to the period applied.
- Costs for building and land to the extent and for the duration used for the project.
- Cost of contractual research, technical knowledge and patents bought or licensed from outside sources at market prices.
- Consultancy and equivalent used exclusively for the research activity.
- Additional overheads incurred directly as a result of the research project.
- Other operating expenses, including costs of material, supplies and similar products incurred directly.

### **Aid for Technical Feasibility Studies**

24. The Framework identifies the levels of aid allowable for technical feasibility studies preparatory to industrial research or experimental development.

### **Aid for Industrial Property Rights costs for SMEs**

25. The Framework allows for aid to SMEs for the costs associated with obtaining and validating patents and other IPR.

### **Eligible Costs**

- Costs relating to the preparation, filing and prosecution of the application and costs incurred in renewing applications before the grant of the right in the first legal jurisdiction.
- Translation and other costs incurred to obtain the granting or validating of the right in other legal jurisdictions.
- Costs incurred in defending the validity of the right.

### **Aid for Young innovative Enterprises**

26. An undertaking will qualify as a young innovative enterprise if it is a small enterprise that has been in existence for less than 6 years:

- and will in the foreseeable future develop products, services or processes which are technologically new or substantially improved and which carry a risk of technological or industrial failure. OR
- The R&D expenses of the enterprise represent at least 15% of its total operating expenses in at least one of the three years preceding the granting of the aid.

27. The beneficiary may receive aid only once during the period it qualifies for young innovative enterprise aid. In addition the beneficiary may receive aid, other than R&D&I and risk capital aid only three years after the granting of young innovative enterprise aid.

Eligible Costs - The granting of this aid is not linked to any specific eligible costs.

### **Aid for Process and Organisational Innovation in Services**

28. In recognition of the fact innovation in services may not always fall within the traditional research categories (fundamental, industrial, experimental development) the Framework allows for the award of aid where specific conditions are met. These include:

- Organisational innovation must always be related to the use and exploitation of ICT to change the organisation.
- The results shall be the development of a standard, of a business model, methodology or concept, which can be systematically reproduced, possibly certified and possibly patented.
- The process or organisational innovation must be new or substantially improved compared to the state of the art in its industry in the EC.
- The process or organisational innovation project must entail a clear degree of risk.

Eligible Costs – as for aid for R&D projects as above.

### **Aid for Innovation Advisory Services and Innovation Support Services**

29. Aid is allowable under the following criteria:

- The beneficiary is an SME
- The aid does not exceed €200,00 per beneficiary within any three year period (this aid may be payable in addition to de minimis aid)
- The service provider benefits from a national or European certification
- The beneficiary must use the State aid to buy services at market price (or at a price which reflects full cost plus a reasonable margin)

Eligible costs – office space, data banks, technical libraries, market research, use of laboratory, quality labelling, testing and certification.

### **Aid for the Loan of Highly Qualified Personnel**

30. Aid can be provided for the loan highly qualified personnel seconded from a research organisation of large enterprise to an SME provided the following conditions apply:

- Seconded personnel must be employed on a newly created function within the beneficiary undertaking

- Seconded personnel must have been employed for at least 2 years prior to the secondment
- Seconded personnel must work on R&D&I activities within the undertaking.

Eligible Costs – all personnel costs, costs of using a recruitment agency, mobility allowance for seconded personnel.

### **Aid for Innovation Clusters**

31. Investment aid can be provided for the setting up;, expansion, and animation of innovative clusters, exclusively to the legal entity operating the cluster. Access to the clusters premises, facilities and activities must not be restricted and the fees charged should reflect their costs.

Eligible Costs- Costs relating to investment in land, buildings, machinery and equipment.

### **The General Block Exemption Regulation (GBER)**

32. The GBER provides for the registration of aid for R&D&I for all the above measures (excluding Aid for Innovation Clusters and Aid for Process and Organisational Innovation in Services) – within certain financial limits, shown in the table below.

33. Aid provided under the GBER has to be registered with the Commission within 20 days from the date it was granted. Aid above the limits shown in the final column of the table is subject to a formal notification for Commission approval under the Framework.

These notes have been prepared for **guidance only**. State aid compliance is the responsibility of the aid provider and recipient and whilst the information in this document is believed to be correct it is not a substitute for legal advice. Aid paid in breach of Commission rules may have to be stopped and/or clawed back with interest from the recipients. If in doubt you should seek legal advice or consult your Regional Development Agency or Devolved Administration. Project Managers shall have no right of action against the BERR or its advisors if they suffer loss or are found to be in breach of state aid rules.

**Aid Intensity levels and thresholds permitted under the R&D&I Framework and the General Block Exemption Regulation**

Aid Measure	Maximum aid intensity level			Threshold permitted under GBER
	Small Enterprises	Medium Enterprises	Large Enterprises	
<b>Aid for R&amp;D Projects: Fundamental Research</b>	100%	100%	100%	€20m*
<b>Aid for R&amp;D Projects: Industrial research</b>  With bonus funding for Collaboration between undertakings, public research body or dissemination of results.	70%  80%	60%  75%	50%  65%	€10m*
<b>Aid for R&amp;D Projects: Experimental development</b>  With bonus funding for collaboration between undertakings or a public research body.	45%  60%	35%  50%	25%  40%	€7.5m*
<b>Technical feasibility studies:</b> - in preparation for industrial research  - in preparation for experimental development	75%  50%	75%  50%	65%  40%	€10m*  €7.5m* * x2 for Eureka projects
<b>Cost of Purchasing IPR for SMEs</b>  * The Commission has queried whether bonuses for collaboration should be permitted for IPR costs.	Up to same level as the aid which led to the IPR concerned*	Up to same level as the aid which led to the IPR concerned*	Not Applicable	€5m (SMEs only)
<b>Aid for Young Innovative Enterprises</b>	Up to €1million	Not Applicable	Not Applicable	€1m. €1.5m in assisted areas (SMEs only)
<b>Aid for Process &amp; Organisational Innovation in services</b>	35%	25%	15% (only in collaboration with an SME where SME incurs 30% of eligible costs)	N/A
<b>Aid for Innovation Advisory Services and Innovation Support Services</b>	Up to €200,000 in a 3 year period	Up to €200,000 in a 3 year period	Not applicable	Up to €200,000 in a 3 year period (SMEs only)
<b>Aid for the loan of highly qualified personnel</b>	50%	50%	Not applicable	Costs incurred for up to 3 years per person (SMEs only)
<b>Investment aid Innovation clusters in assisted areas clusters</b>	35%	25%	15%	N/A

