



State Aid

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Introduction

- **General Overview of State aid law**
- **Particular points of relevance to the Carbon Challenge Fund**

What is State Aid?

- **EU Treaty is about free and competitive markets**
- **State funding can distort that market**
- **If there is a risk of that then Europe needs to be notified of the state funding**
- **Certain exemptions apply so that not all distortive state funding is forbidden**
- **These exemptions are changing due to the current economic crisis**

Why Restrict aid?

- **An element of competition law**
- **Intent is:**
 - to foster undistorted competition within the Common Market
 - to enhance economic efficiency
 - to avoid waste of State resources
- **Enforced by EC Commission along with National Courts**
- **Commission's objective is "less but better targeted aid"**
- **Commission faces significant challenge enforcing the law in current economic conditions, e.g. bank rescue packages, measures to help the "real economy"**

Definition of State Aid

Article 87(1) of the EC Treaty:

"...any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods... in so far as it affects trade between Member States..."

The Legal Position on State Aid

- **Under Article 87(1) State aid is prohibited unless:**
 - it falls within an aid scheme approved by the Commission
 - it is covered by a block exemption regulation
 - has been individually approved by the EC Commission under Article 87(3) of the Treaty
- **Article 87(3)**
 - "balancing test"
 - is there a need for State intervention (e.g. a market failure)?
 - is State aid the right way to address that need?
 - is aid a proportionate response?
 - do the benefits outweigh the distortive effect of aid?

Consequences of unlawful State aid

- **The Commission may order the recovery with interest from the beneficiary of aid that has not been approved (and which cannot be approved)**
- **Competitors that can prove loss may sue the awarding body in the Courts for damages**
- **Interim injunctions/Commission interim measures to suspend aid payments**
- **Could cause projects to be abandoned**
- **May force changes to legislation/abandonment of Government policies**

Explanation of the Legal Definition

- **Legal definition:**
 - An "advantage" in any form whatsoever
 - Conferred by the State or through State resources
 - Which benefits particular "undertakings" or the production of certain goods
 - Thereby distorting competition and
 - Potentially affecting trade between EC Member States
- **Important to note that advantages can arise at a number of levels, e.g.:**
 - the direct recipient of State support; and
 - customers of that undertaking

What is an advantage?

- **Wide category of benefits, e.g.:**
 - Subsidies/grants
 - Loans at preferential interest rates
 - State-backed loan guarantees
 - Sales of land or assets at an undervalue
 - Capital injections by the State
 - Tax breaks
 - Funding of infrastructure projects that benefit specific undertakings
 - Generally, any departure from normal commercial terms in agreements between a State body and an undertaking, e.g.:
 - overpayment by State / superfluous procurement
 - provision of assets/services by State at an undervalue
 - unequal allocation of risk or reward between public and private parties

Explanation of the Treaty Definition (1)

- **Granted by a State or through State resources**
 - need not involve a direct financial transfer from State to recipient
 - can include public money dispensed via private body
- **Not all payments by State are aid:**
 - paying for services of general interest
 - private investor/private creditor test
- **Collaborative ventures between public (e.g. local authorities) and private parties can raise concerns**

Explanation of the Treaty Definition (2)

- **Distortion of competition**
 - difficult to argue against
- **Favouring undertakings/goods (“selectivity condition”)**
 - distinction between State aid and general measures e.g. Infrastructure
 - but is beneficiary an “undertaking”? Obviously includes private companies but can also include State owned bodies that provide goods or services on markets, e.g. health/education?

Block exemptions (1)

- **The General Block Exemption (Reg. 800/2008)**
 - Replaces existing block exemptions on
 - investment aid for Small and Medium Sized Enterprises ("SMEs")
 - research and development aid in favour of SMEs
 - employment aid
 - training aid
 - regional aid
 - In addition, allows the following:
 - aid favouring environmental protection
 - aid in the form of risk capital
 - research and development aid for large companies
 - innovation aid
 - aid for newly created small enterprises
 - aid for enterprises newly created by female entrepreneurs
 - Subject to aid intensity and value ceilings set out in the Regulation

Block Exemptions (2)

- ***De minimis* block exemption (Regulation 1998/2006)**
 - Applies where total *de minimis* aid received from all sources in previous 3 years does not exceed €200,000
 - Last resort: onus on Member State to demonstrate that it applies
- **Decision of 28 November 2005 on Services of General Economic Interest ("SGEI")**
- **Specific rules for agriculture, fisheries, energy and transport**

Frameworks, guidelines and communications

- **Where a block exemption does not apply (and aid cannot otherwise be excluded), necessary to notify the Commission**
- **Where appropriate Commission will apply published guidelines or frameworks, e.g.:**
 - aid for research, development and innovation
 - environmental aid
 - regional aid
 - risk capital
 - rescue and restructuring
 - services of general economic interest
 - guarantees
- **Where guidelines not applicable, aid measures will be assessed under the Treaty directly**
- **Notification period typically 5 - 6 months for first stage**

Specific state aid measures in relation to the Credit Crunch

- Measures in relation to banking rescues
- Temporary framework to support access to finance in the current financial and economic crisis
- Commission coming under pressure to relax rules but determined to hold the line in face of potentially increased protectionism in some Member States

The Temporary Framework

Relaxes the rules on State aid in six ways

- Increase in the *de minimis* threshold
- aid in the form of guarantees
- loans at subsidised interest rates
- aid for production of green products
- risk capital measures
- short term export credit insurance

De minimis aid

- The European Commission considers that public funding of up to €200,000 over a 3 year fiscal period has a negligible impact on trade and competition, and does not require notification.
- The sterling equivalent is calculated using the Commission exchange rate applicable on the written date of offer of the funding.
- This does *not* mean that all funding under the €200,000 ceiling should be counted as de minimis.

What do we take into account?

- This ceiling takes into account all public assistance given as de minimis funding over the previous 3 years and which can take various forms (grants, loans, subsidised contracts, etc).
- Aid given under an approved scheme does *not* have to be cumulated with de minimis aid.

Requirements (1)

- You should assess whether the assistance will constitute state aid.
- You must assess whether the aid can be provided under De Minimis
- You must obtain a signed declaration from a director of the undertaking before the aid is provided.

Requirements (2)

- **The recipient should be sent a letter confirming the amount of aid provided in both Pounds Sterling and Euros;**
- **The letter should clarify that the aid was provided under De Minimis; and**
- **Records that each step has been followed should be retained for 10 years.**

New Requirements (1)

- Under the Temporary Framework up to €500,000 may be provided as De Minimis Aid under notified scheme N43/2009: “Small Amounts of Compatible Aid”.
- Same requirements as before but this declaration must set out:
 - (a) the amount of aid to be provided and
 - (b) the director must sign to confirm that receipt of that aid would not take the amount of De Minimis aid that the undertaking has received between 1 January 2008 to 31 December 2010 to above €500,000.

New Requirements (2)

- That the recipient was not a “business in difficulty at 1 July 2008.
- Ends on 31 December 2010
- Due to be investigated in October 2009.

What is an undertaking? (1)

- Are any organisations exempt from the state aid rules?
- Short answer is – No! Even bodies you would normally regard as public bodies like clusters, charities, colleges and not for profit bodies can be state aided and asked to repay state funds they have received.
- What is important is what these bodies do with the state funds, and not what their nature or constitution is.
- In general government departments, RDA's and local authorities are recognised “arms of state” for EU purposes.

What is an undertaking? (2)

- **But even these bodies need to be careful how they involve themselves in the market.**
- **Colleges, not for profit bodies, charities etc may be in breach of state aid rules if they use state funding to provide goods or services which could otherwise be available in the market.**
- **Examples of these goods and services are training, management consultancy, dealing in and management of land, project management etc.**

Any Questions?