



State Aid in Research, Development & Innovation: A Guide for Universities

Produced by AURIL & PraxisUnico

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FOREWORD

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State Aid. It's a fairly innocuous sounding term, which belies its importance and the potential consequences for those who ignore its implications. State Aid doesn't represent a glittering, enticing opportunity for universities and it certainly isn't the sort of topic that animates and enthuses researchers, professional services staff and Vice-Chancellors. That said, we suggest that the sector should be paying more attention to this issue and an understanding of the basic principles is likely to facilitate improved decision making by academics and senior managers who are active in the innovation space. (We will take this opportunity to remind the reader that it isn't just in relation to research, development and innovation where universities may need to consider State Aid, but other areas are outside the scope of the current document.)

This guide was prepared in order to inform universities which are active in R&D and innovation about State Aid legislation in order that any associated risks can be assessed and mitigated. Our intention is to encourage research, development and innovation – and hence economic growth - by demystifying the regulations and providing examples (case studies) which resonate with the higher education sector. Ultimately, the State Aid regulations exist and need to be complied with, but there are broad exemptions such as the GBER which provide universities with a great deal of freedom to operate effectively.

A typical definition describes State Aid as a European Commission concept which refers to public aid which is given to undertakings (usually, but not exclusively, businesses) on a discretionary basis, hence potentially distorting competition and affecting trade between Member States of the European Union. The public aid need not necessarily entail a cash transaction hence, for example, free or subsidised consultancy advice provided by a university to a company could be State Aid. Immediately we can see that State Aid could have an enormous bearing on the increasingly important Impact agenda for universities.

Institutions run the risk of unwittingly falling foul of State Aid legislation if their interactions with external organisations are carried out without due regard to its restrictions. Conversely, a lack of awareness of what is permissible under this legislation might result in universities being overly conservative or risk averse in their interactions with industry. When universities act appropriately and in accordance with relevant legislation in accounting for State Aid this is, in effect, protective of their industry partners - since a breach could require those businesses to repay unlawful aid. This highlights our intentions for this Guide – **to inform risk assessment and decision making by universities and thereby to support knowledge exchange and innovation.**

In early 2014 BIS and HEFCE initiated a meeting with university knowledge exchange staff to explore State Aid issues, including the sector's level of understanding of the legislation and whether there were any key areas which might be having a negative impact on the commercialisation of research. This so-called 'sounding board' session was organised by AURIL and PraxisUnico and one outcome of the meeting was for the two organisations to consider a collaboration to produce new guidance for the UK Higher Education sector on State Aid and how it should be addressed in a Research and Development context. We are delighted to report that HEFCE was highly supportive of this idea and, in late 2014, awarded our two organisations a grant to support the work. HEFCE's support allowed us to enlist the talents of two firms of solicitors in drafting the main content, namely Blake Morgan LLP (represented by Emyr Lewis) and Northwood Reid (represented by Christine Reid, who is probably best known in the sector for her contributions to the Lambert Agreements).

Many universities have generously contributed to this Guidance, including inputs from steering group members and those who provided ideas for the case studies which are spread throughout the document. We also gratefully acknowledge the advice received from a wider group of stakeholders including BIS, the UK Research Councils, the Confederation of British Industry and State Aid experts in devolved governments from across the UK.

EXECUTIVE SUMMARY

What is State Aid?

State Aid is the use of state funding or resources to support businesses (in State Aid speak, undertakings). The decisive factor in determining whether an entity is an undertaking is not the nature of the entity itself, but the nature of what it does. If it carries out an economic activity, selling goods or services on a market, it is an undertaking. Publicly funded institutions including universities can therefore be undertakings for the purposes of State Aid.

When is State Aid unlawful?

Not all State Aid is unlawful, but any State Aid which has an anti-competitive effect within the EU will be unlawful unless the aid comes within an exemption or the European Commission authorises that aid. Exemptions are an important tool used to facilitate and encourage investment in research, development and innovation, leading to economic growth. State Aid legislation ensures that there is fair and open competition within the EU without Member States subsidising businesses unfairly.

In the absence of an exemption, State Aid will be unlawful if it involves a transfer of state resources which is selective and confers an advantage on an undertaking which threatens to distort competition and has an effect (actual or potential) on trade between EU states.

State resources are those which provided by or through the government of a Member State, or an arm of the government (e.g. a public body), either directly or through an intermediary. A transfer of resources to an undertaking will happen where money is paid, a resource is provided or an economic benefit is conferred. Aid is selective if only certain businesses, sectors or regions benefit from it. Aid which is available to all businesses wanting to take it up is not selective. An advantage is an economic benefit which the undertaking would not have received in the normal course of things. A transaction which is on terms more favourable than normal market terms will confer an

advantage. In almost all cases of selective aid, competition will be distorted, and there will be an effect on inter-state trade. In the case of research and development, intra-EU trade is likely to be affected due to the internationally tradable nature of R&D.

Notification

Unless covered by an exemption from notification, any proposed State Aid must be notified to the European Commission for assessment.

If aid is not exempt from notification and it is given before it has been notified to and approved by the European Commission (or the Commission has decided that it is not State Aid or that the Commission will not raise any objection), it will be unlawful aid.

Exemptions

There are important exemptions to the need to fully notify, including the *de minimis* exemption which enables a small amount of aid to be given in certain circumstances, and the General Block Exemption Regulation (GBER) which allows aid to be provided to meet certain costs (including research and development costs) within financial limits.

De Minimis Aid: It is generally lawful to give aid of up to €200,000 (€100,000 for road transport) over 3 fiscal years. Before using this exemption, you should carry out a due diligence exercise to ensure that the aid does not cause this threshold to be exceeded. The value of aid provided also needs to be confirmed in writing.

GBER: This makes certain types of aid lawful, without them having to be notified in advance to the Commission. There are 13 categories of permitted aid, each with its own conditions and financial limits. The Commission must be notified within 20 days of a grant of aid under the GBER unless the aid is granted under a GBER scheme (and the latter is usually the case).

Universities and State Aid

Funding a university's core activities - teaching and non-commercial research - is not State Aid.

In other cases, a university may be a recipient of State Aid and/or an intermediary through which State Aid flows to business.

If a university carries out an economic activity (e.g. contract research or the provision of consultancy services) funded by, or using resources funded by, the state or an arm of the state, the university will usually be a recipient of State Aid. It may be able to avoid this if the economic activity does not account for more than 20% of the annual capacity of the relevant part of the university (this is expanded upon later in this Guide).

If a university charges an undertaking the market rate for services, there will be no State Aid to the undertaking.

If a university uses state funding or resources (including funds received by it for the purpose of carrying out its core activities) to fund or assist an undertaking (e.g. it carries research with or for a business at less than the market rate), the undertaking may be a recipient of State Aid.

The Research, Development and Innovation Framework

The European Commission has established rules that facilitate the granting of aid measures by Member States in support of research, development and innovation (R&D&I) activities. The R&D&I State Aid Framework sets out the conditions under which Member States can grant State Aid for the purpose of carrying out R&D&I activities. The Framework does not create any exemptions. Its main purpose is to explain the approach that the European Commission will take to State Aid issues when assessing proposed aid for Research, Development and Innovation which is not covered by an exemption.

The Framework is also helpful in that it sets out the Commission's thinking on State Aid and universities and explains how collaborative research can be structured in such a way so as to involve no State Aid.

INTRODUCTION

Do I need to read this guide?

If you work in a university, research institution or other higher education institution in the UK, and you are involved in research and development, innovation, commercial activities or engage with businesses or undertakings, this guide is designed to help you to understand State Aid. It is particularly relevant to research office personnel, technology transfer officers and staff involved in knowledge exchange.

For the purposes of this guide we will refer to a university throughout, but the guidance is equally applicable to any higher education institution or research institute in the UK, and undertakings with which a university engages may also find it useful to read this guide.

The State Aid rules can be complicated, but they have been designed by the European Commission (the Commission) to help ensure that state funding and other resources are provided and used in a non-discriminatory way which does not distort competition in the European Union.

By being familiar with the State Aid rules, and designing projects and programmes to comply with them, you can receive and use state funding and resources in a way which can benefit both your institution and the undertakings with which it engages.

The consequences of ignoring the State Aid rules can be far-reaching, financially and in terms of damage to reputation, for both your institution and the businesses with which it engages.

In some cases, funding bodies will insist on a university confirming that a project is State Aid compliant before they will agree to provide funding, and the university should be prepared to provide evidence that State Aid implications have been identified and an explanation of how and why the project is State Aid compliant.

What is State Aid and what is its purpose?

IN A NUTSHELL

The purpose of the State Aid rules is to promote competition by preventing Member States of the EU from subsidising businesses (in State Aid speak, undertakings) unfairly. The State Aid rules are designed to help create or maintain a level playing field within the EU.

Not all aid to businesses is unlawful, but any State Aid which has an anti-competitive effect within the EU will be unlawful unless the Commission authorises that aid (either specifically or through an exemption) or decides not to raise any objection to it.

THE DETAIL

The starting point is Article 107 of the Treaty on the Functioning of the European Union (the TFEU).

This provides that any aid granted by a Member State of the European Union or through state resources (in any form and at any level - national, devolved, regional or local) which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the internal market and therefore prohibited. That is called unlawful State Aid, or just unlawful aid.

Article 107 prohibits State Aid because it distorts the market and market distortion can lead to less competition, lower levels of innovation and higher prices.

The Commission has wide powers to monitor and control State Aid.

Not all aid provided by Member States to undertakings is unlawful. If the aid does not meet all of the Article 107 criteria, it will not be State Aid. Even if it does meet those criteria, the Commission recognises that it can have a positive effect and that there can be a genuine need to help undertakings in order to promote economic development.

The Commission also has wide powers to determine that some State Aid is not incompatible with the internal market, and to approve State Aid, either on a case by case basis or by exempting certain types of aid.

Universities and State Aid – Economic and Non-Economic Activities

IN A NUTSHELL

Not all use of state funding or resources is State Aid.

Funding a university's core activities - teaching and non-commercial research - is not State Aid.

In other cases, a university may be a recipient of State Aid and/or an intermediary through which State Aid flows to business.

If a university carries out an economic activity, e.g. it rents equipment or lab space or supplies services to businesses, or it carries out contract research, the funding of those activities by the state or an arm of the state will usually represent State Aid to the university.

If a university uses state funding or resources (including funds received by it for the purpose of carrying out its core activities) to fund or assist an undertaking (e.g. it carries research with or for a business at less than market rate), the undertaking may be a recipient of State Aid.

If a university charges an undertaking the market rate, there will be no State Aid to the undertaking.

Not all State Aid is unlawful; there are exemptions.

The Commission has developed State Aid rules which facilitate collaborative research and other activities commonly undertaken by universities.

THE DETAIL

State Aid should be on your list of issues to consider if your university receives or makes use of funds or resources which have been funded by the state or an arm of the state, such as a Research Council or Innovate UK grant.

If the funding or resources do not come from the state or an arm of the state (e.g. if a research laboratory is funded entirely by a private research foundation), the issue of State Aid will not arise.

The state funding of a university will be State Aid if the university carries out an economic activity consisting of offering products or services on a given market, but the Commission normally regards the funding of the following to be non-economic, i.e. not State Aid:

- a) a university's primary activities such as:
 - education for better and more skilled human resources;
 - independent R&D (including collaborative R&D) for more knowledge and better understanding where the university engages in effective collaboration; and
 - the wide dissemination of the results of research on a non-exclusive and non-discriminatory basis, e.g. through teaching, open-access databases, open publications or open software; and
- b) knowledge exchange, knowledge transfer and technology transfer activities, where those activities are conducted either by the university (including its departments or subsidiaries) or jointly with, or on behalf of other such entities, and where all profits from those activities are reinvested in the primary activities of the research organisation or research infrastructure.

The R&D&I Framework distinguishes between two sorts of potential State Aid:

- a) the state funding of a university; and
- b) indirect State Aid provided to undertakings through a university.

If a university carries out an economic activity (e.g. renting equipment or lab space or supplying services to undertakings, or carrying out contract research) the funding of those activities by the state or an arm of the state will usually be State Aid to the university, but it will not necessarily be unlawful.

Where a university carries out almost exclusively non-economic activities or research infrastructure is used almost exclusively for non-economic activities, the funding may fall outside State Aid rules, so long as any economic activity is purely ancillary, i.e. the economic activity must:

- correspond to an activity which is directly related to and necessary for the operation of the university or research infrastructure; or
- be linked intrinsically to main non-economic activities; and
- be limited in scope.

Those criteria are difficult to establish but the Commission has stated that it considers those criteria to be met if:

- a) the economic activities consume exactly the same inputs (e.g. material, equipment, labour and fixed capital) as the non-economic activities; and
 - b) the capacity allocated each year to the economic activities is not more than 20% of the "relevant entity's" overall annual capacity. For practical purposes, a conservative approach is to treat the "relevant entity" as the part of the university (such as the laboratory, or research institute, or business school, etc.) which is carrying out the specific economic activity, rather than the university as a whole. This is because the entity carrying out the activity needs to be specific enough such that "the economic activities consume exactly the same inputs (such as material, equipment, labour and fixed capital) as the non-economic activities" (R&D&I Framework). See also the advice presented by the European Commission to the Czech Republic, available at: http://www.msmt.cz/file/34196_1_1/ (accessed 03rd December 2015).
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If a university is both publicly and privately funded, the Commission considers that the costs linked to the economic activities are funded by the state if the public funding allocated to the university for a specific accounting period is more than the costs of non-economic activities incurred in that period.

It is clear from this that universities should keep their economic activities separate from their non-economic activities to ensure that they can demonstrate that their non-economic or primary activities are not subsidising their economic activities.

That may be done by:

- keeping separate accounts sufficient to demonstrate this; or
- channelling economic activities through a subsidiary company which the university uses to carry out commercial research or to carry out other trading activities.

If a university engages with undertakings which gain an advantage from the use of assets or resources which have been created or acquired using state funding or resources, that undertaking may be in receipt of State Aid.

But there will be no advantage (and no State Aid to the undertaking) if the transaction between the university and the undertaking is on normal market terms. (See State Aid Test 2 below.)

CASE STUDY - Providing consultancy advice to SMEs as part of a programme supported by public funding (Part 1 – aid to the university)

Scenario: The university's Business School has established a High Performance Programme to advise SMEs on lean thinking methodologies.

The Programme is funded by a grant to the university from the regional government that covers project staff and other direct costs. The project's targets require the university to visit 100 SMEs and to provide them with a report analysing their production processes.

The university is contractually obliged to follow up with 25 of the participating SMEs. The expectation is that the university will enter into a further agreement with those 25 SMEs to carry out more in-depth work and interventions in implementing lean methodologies and improving productivity.

In neither phase of the Programme will any cash support be provided to the SMEs.

The Programme does not constitute research and will not generate new knowledge. However, it will demonstrate the real world utility ('Impact') of the university's research and will provide the university with useful case studies (e.g. for use in the Research Excellence Framework, REF).

Comment: Almost inevitably, the university will be alerted to the possibility of State Aid issues by the conditions of funding by the regional government. The terms of the grant may require a detailed explanation of how State Aid issues will be addressed.

There is a possibility of both the university and the SMEs being recipients of State Aid.

Aid to the university:

In providing consultancy services, the university is engaging in an economic activity. If the payments to it by the regional government are no more than the market rate, there will be no State Aid to the university, but the university should be prepared to demonstrate that it is not being paid more than the market rate. That will be established if the regional government went out to tender when selecting the university.

Alternatively, depending on the circumstances, the university might decide that it is willing to risk relying on the argument that it carries out almost exclusively non-economic activities, this economic activity is purely ancillary and that the economic activities consume exactly the same inputs (labour and fixed capital) as the non-economic activities and that in any year not more than 20% of the Business School's activities are economic activities.

Possible aid to the SMEs is explored later in Part 2 of this case study.

CASE STUDY - Support for research and development of a company product on a shared-cost basis

Scenario: A small pharmaceutical company has a potentially exciting new product in development and has been discussing research and development requirements with the university's Pharmacy Department. The university's academic lead believes that the new compound might successfully treat a common and debilitating condition.

The company cannot afford to pay the full cost of development work required to demonstrate initial in vitro activity of the compound. The academic nevertheless wishes the university to agree to undertake the development project on the basis that the science is interesting and he believes that the university should be supporting work of this nature as part of its contribution to the health and welfare of society.

The university is considering undertaking the project at a price which represents less than the full economic cost of the work, but on the basis that the university will receive a royalty on future sales should the product ultimately be successfully commercialised by the company.

Comment: This is a not uncommon scenario where, for whatever reasons, a company wishes to collaborate with a university but is unwilling or unable to pay a market rate for the university's input.

If the university is carrying out contract research for the company, it should charge a market rate, otherwise the company will be in receipt of State Aid if it benefits from the use of state-funded resources.

Alternatively, the university and the company may carry out a project where there is effective collaboration. In that case, even if it does not pay the market rate or the full costs of the project the company will not be a recipient of State Aid if the results of the collaboration which do not give rise to IPR are widely disseminated and any IPR resulting from the project and access rights are allocated between the university and the undertaking so as to reflect their work packages, contributions and respective interests, or the university receives compensation equivalent to the market price for the IPR which results from its activities and which is assigned to the company.

The State Aid Tests

The following four tests are used to determine whether there is unlawful State Aid. If the answer to any one or more of those questions is no, there will be no unlawful State Aid, and in some cases no aid at all.

BIS have produced diagrammatic Q&As to help determine whether there is State Aid. These can be found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/443686/BIS-15-417-state-aid-the-basics-guide.pdf.

Test 1: Is there a transfer of state resources to an undertaking?

This test is in two parts:

1.1 Is there a transfer of state resources?

IN A NUTSHELL

State funding or resources are provided by or through the government of a Member State, or an arm of the government, either directly or through an intermediary.

A transfer of resources will happen where money is paid, a resource is provided or an economic benefit is conferred on terms which are not market terms.

THE DETAIL

The fundamental question is whether aid or assistance of some kind is provided by central government, a devolved administration, a regional authority or a local authority, either directly or through an intermediary.

The funding need not originate from the Member State's budget. Funding which is allocated by the state, either directly or through an intermediary, is a state resource. For example, National Lottery funding and European Structural and Investment Funds (ESIF, including the European Regional Development Fund (ERDF) and the European Social Fund (ESF)) are treated as a state resource for State Aid purposes because

a Member State ultimately controls how that funding is used. ESIFs, unlike the Commission's Horizon 2020 funding, are managed by Member States and are considered to be state resources. Therefore, any funds provided by the state and any ESIF monies must be added together when determining the total amount of funding transferred from state resources to an undertaking.

A transfer of resources (aid, assistance or support) may take many forms. The most obvious is making a grant, but it also includes: the sale or licensing of land or another asset (including intellectual property); buying-in goods or services; the provision of facilities (such as laboratory space and facilities) or services (such as consultancy or research services); the making of a loans; and investment in a business where, in each case, an advantage is conferred. (See Test 2 below.)

In many cases the aid may not be granted directly by a Member State. Instead it may be granted through an intermediary (for instance through Innovate UK or HEFCE) or it may be indirect aid (for instance, a business with which a university is carrying out a research project may benefit indirectly from the intellectual property rights which have been created by the university using state funding).

1.2 If there is a transfer, is the transfer to an undertaking?

IN A NUTSHELL

The decisive factor in determining whether an entity is an undertaking is not the nature of the entity itself, but the nature of what it does (i.e. usually the activities being funded).

If it carries out an economic activity, it is an undertaking.

Publicly funded institutions, universities, charities (and even local authorities and government departments) can be undertakings for the purposes of State Aid.

THE DETAIL

An undertaking is any entity, regardless of its legal status and the way in which it is financed, which is engaged in an economic activity, i.e. an activity consisting of offering goods and services on a given market and which could be carried out by a private operator in order to make a profit. (It does not matter whether a profit is actually made.)

It is the nature of the activity which is important and not the nature of the entity. The entity need not be a private sector or for-profit organisation. A public sector or not-for-profit organisation will be an undertaking if it carries on an activity which could have commercial competitors.

An undertaking may be a private body, company, partnership, sole trader, co-operative, trade association, voluntary organisation, charity, university, research organisation, social enterprise, not-for-profit organisation, or even a public body or government department, when it is engaged in an economic activity.

The number of activities which are economic has increased as the nature of the economy and the extent of market competition have developed, for instance through privatisation.

Some entities carry out both economic and non-economic activities. Universities are prime examples of this (see the section on "Universities and State Aid – Economic and Non-Economic Activities" above), and they will be treated as undertakings when they carry out economic activities. Any public subsidy or support for their economic activities or any use by them of publicly-funded resources (e.g. research labs) to support any economic activity may be State Aid.

Some activities are designated as non-economic by the Commission, even though they happen under market-like conditions. When carrying out these activities, the entity will not be an undertaking.

Test 2: Does the aid confer an advantage on the recipient of the aid/the beneficiary?**IN A NUTSHELL**

An advantage is an economic benefit which the undertaking would not have received in the normal course of things.

A transaction which is on terms more favourable than normal market terms will confer an advantage.

A transaction on normal market terms will not confer an advantage.

An advantage is an economic benefit which the undertaking would not have received in the normal course of business, e.g. it is conferred for free or on terms which are better than normal commercial terms.

The sale or licensing of an asset at less than the market value or rate, buying-in goods or services at more than their market value, the provision of facilities (such as laboratory facilities), or services (such as consultancy or research services) for free or below the market rate, the making of a loan at a low interest rate, and investment in a company on terms which a private investor operating under normal market economy conditions would not accept, may all confer an economic advantage.

On the other hand, purchasing or supplying goods and services at the full market rate or price or investing in a company on terms which a private investor operating under normal market economy conditions would accept does not confer an economic advantage.

A cornerstone of State Aid is that there will be no State Aid where the benefit is conferred on terms which an independent private investor, operating in a market economy, would have accepted. This is called the market economy operator principle or MEOP (or sometimes the market economy investor principle, MEIP). If a university seeks to rely on this principle it is important to have benchmarks in order to demonstrate that the institution was acting in the same way as a private investor would in the same circumstances.

Support for general infrastructure projects (e.g. streets, waterways, coastal paths, cycle trails, improvement of public transport infrastructure or road networks, public amenities, sewage collection), provided it is available for use by all on equal terms and does not benefit any particular undertaking, will not be unlawful aid. On the other hand, the use of state funding for the construction of infrastructure with a view to its subsequent commercial use will confer an advantage on the operator of that infrastructure.

Test 3: Is the aid selective? Does it favour certain undertakings or the production of certain goods?**IN A NUTSHELL**

Aid is selective if only certain businesses, sectors or regions benefit from it.

Aid which is available to all businesses wanting to take it up is not selective.

Aid is selective if it targets particular sectors, businesses, locations or types of undertaking (such as participants in a research project).

Aid which is granted only to certain sectors or regions is selective, so aid which is granted only to the automotive sector, or only to SMEs or only to undertakings in Wales, (for example) will be selective.

An aid scheme is selective if the organisation which administers it has some degree of discretion (e.g. where Innovate UK assesses grant applications).

Aid which is available to all businesses wanting to take it up is not selective.

Examples of activities which are not selective are:

- general training schemes such as apprenticeships; and
- general awareness raising activities and the promotion of best practice through the provision of information and guidance available to everyone.

Test 4: Does the aid distort competition (actually or potentially) and does the aid affect trade between Member States?

IN A NUTSHELL

In almost all cases of selective aid, competition will be distorted, and there will be an effect on inter-state trade.

THE DETAIL

This test is in two parts:

Is there actual or potential distortion of competition?

Competition is distorted if the aid strengthens the competitive position of the beneficiary or recipient of the aid in relation to its competitors. The Commission takes the view that most aid distorts, or potentially distorts, competition and the onus is on the Member State to prove there is no distortion.

Note that potential, as well as actual, distortion of competition is captured, so the test applies if a market could emerge, even if there is no market yet.

The beneficiary's share of the market and the size of the distortion are irrelevant and the status of the beneficiary is irrelevant if it is engaged in an economic activity.

Does the aid affect trade between EU Member States?

It is sufficient to affect trade between Member States if the beneficiary is involved in an economic activity and operates in a market in which there is trade between Member States. Most products and services are traded between Member States. Therefore aid for any business or economic activity may affect, or be capable of affecting, trade between Member States. This applies even if the beneficiary does not actually trade with other Member States.

The market share of the beneficiary and the effect of the aid are irrelevant to this question.

The only exceptions to this rule tend to be very local businesses which are not close to a Member state border (e.g. hairdressers or small cafés).

THE INTERPLAY OF CHARITY LAW AND STATE AID LAW

IN A NUTSHELL

Charity law and State Aid law involve different considerations and compliance with one body of law is no guarantee of compliance with the other.

Carrying out charitable research for the public benefit will usually not be an economic activity so there will be no aid to the university when it receives and uses state funding for that purpose.

The public funding of a university's economic activities (including contract research) will usually represent State Aid.

A university investing in a spin-out company must comply with both charity law and State Aid law.

UK universities are charities, and as such they have a duty to further the charitable aims set out in their constitution for the public benefit. But that does not mean that in some circumstances universities cannot be undertakings pursuing an economic activity (offering products or services on a given market) for the purposes of State Aid law.

When a university carries out research it may do so either:

- in furtherance of its main charitable aim or primary purpose (charitable research); or
- to generate a financial return which is then used to further its charitable aims (non-charitable research).

Research will be charitable only if:

- the research is a useful subject of study or is directed towards establishing an outcome which is of value, and it is calculated to promote the university's charitable aims;

- there is an intention to disseminate to the public, and others able to use or benefit from it, useful knowledge (i.e. which increases understanding or produces other outcomes for the public benefit) acquired as a result of the research; and
- the research is undertaken for the benefit of the public or a section of the public, and not only or mainly for self-interest or for private or commercial purposes, although there may be an incidental benefit to a commercial collaborator.

Earlier we have described the range of university activities which the European Commission normally regards as non-economic, i.e. not State Aid.

If a university performs economic activities, e.g. renting equipment or lab space or supplying services (including contract research) to undertakings, the public funding of those activities will usually be State Aid to the university unless the capacity allocated each year to the economic activities is not more than 20% of the "relevant entity's" overall annual capacity (see above).

The Commission will not consider the university to be a beneficiary of State Aid if the university acts only as an intermediary which:

- a) passes on all the advantages to the final recipients, e.g. through reduced prices; and
- b) obtains no further advantage because it has been selected through an open tender procedure or the public funding is available to anyone who satisfies the necessary objective conditions, so that the final recipients may acquire equivalent services from any intermediary who satisfies those conditions.

But, in those circumstances, there is likely to be indirect State Aid to the final recipients.

The result is that where a university carries out charitable research, it is unlikely to be in receipt of State Aid, but it is still possible that an undertaking with which it collaborates does receive State Aid. Where a university is engaged in non-charitable research, it will be carrying out an economic activity and if it uses publicly funded assets or resources to do so, it will be in receipt of State Aid. If the benefit of using those publicly funded assets or resources is passed onto a collaborator which does not pay the market rate for the same (in money or in kind) then the collaborator will be in receipt of State Aid (and an in-kind contribution to the activity might mean, for example, that the collaborator expends its own staff and other resources in carrying out the collaboration).

To comply with charity law, a university investing in a spin-out company should do so on an arm's length basis, based on a sound business case showing a return on investment sufficient to justify the university's investment.

To avoid the spin-out company and other investors being recipients of State Aid, the university should invest in the spin-out company on the same basis as a market or private investor would. If a private investor is investing in the spin-out, the university should not invest on terms which are less favourable to the university than the terms on which the private investor is investing. For instance: if the university is making a loan to the spin-out, that loan should be on commercial terms and rank alongside other borrowing; and if the university is licensing IPR to the spin-out company the terms of the licence should be no more favourable to the spin-out than they would be were the licence to be granted on an arm's length basis.

CASE STUDY – Licensing technology to a spin-out company

Scenario: An exclusive licence of patented technology is granted by the university to a spin-out company.

The technology was developed by the Department of Engineering and was funded from a mixture of sources, including Research Councils and private companies. The lead academic and investigator on the RCUK awards will remain an employee of the university and will be a shareholder and non-executive director of the spin-out company.

The licence to the spin-out is provided on terms that are favourable to the company, i.e. no royalties are payable and the company will have the right to take a licence to future IPR (and the development of that IPR will be funded by Research Councils and other third parties).

Comment: The arrangements are highly beneficial to the spin-out company and there is no doubt that it is a recipient of State Aid – it is receiving an advantage in the form of the licence and it is not paying market rate. It is unlikely that an independent company which was interested in acquiring the rights to use the technology would be granted a licence on terms which were as favourable as those agreed with the spin-out.

Although the one of the categories of aid under the GBER is investment aid to an SME, an intangible asset such as IPR must be acquired at market rates from third parties unrelated to the buyer, so that will not apply in this case.

Nor is there any scope for using the provisions of the GBER in relation to risk finance aid, because that must be made through a financial intermediary or aid for start-ups because in the latter case the aid must be in the form of a loan, guarantee or grant.

Outside investors in the spin-out company will also receive an indirect advantage and State Aid in that the value of the company will be enhanced by the generous licence terms.

N.B. If the university had developed the technology using funding from the private sector and no funding from the state, and the spin-out company was receiving the same licence, there would be no State Aid, but the university could still have a problem under charity law in that the licence may be a misuse of charity resources and not in furtherance of the university's primary, charitable purposes.

Universities should have robust policies which address the conflicts of interest which can arise in relation to innovation and commercialisation activities. For example, academic staff and researchers who have an equity stake or other personal interest (e.g. a consultancy arrangement) in a spin-out company should not be in a position to influence the terms between the university and the spin-out company.

EXEMPTIONS AND AID SCHEMES

The State Aid Rules

IN A NUTSHELL

The Commission has issued regulations, notices, communications, frameworks and guidelines which exempt some forms of State Aid from full notification to the Commission before being granted.

THE DETAIL

The Commission appreciates that some aid is beneficial to the economy (especially where there is market failure) or supports community objectives. It has therefore developed State Aid rules which allow the Member States (and public authorities such as universities) to assist undertakings in a way which avoids giving those undertakings an unfair advantage to the detriment of their competitors and falling foul of the prohibition on State Aid in the TFEU.

The expression the State Aid rules is short-hand for the regulations, notices, communications, frameworks and guidelines issued by the Commission.

All the State Aid rules currently in force can be found at: http://ec.europa.eu/competition/state_aid/modernisation/index_en.html.

That website contains the text of:

- the provisions of the TFEU relating to State Aid;
- the procedural rules relating to notification, the Commission's assessment following a notification, making complaints, the recovery of State Aid etc.;
- evaluation of Aid schemes;
- the *de Minimis* Regulation and the GBER;
- horizontal (or cross industry) rules containing conditions for aid measures which apply across the economy and which are aimed at solving problems in any industry. (Contrast the sectoral rules which apply to specific sectors.) The horizontal rules include the R&D&I Framework. There are also horizontal rules for regional aid, aid to disadvantaged workers and disabled workers, training aid, aid for climate change and other environmental protection, risk capital, rescuing and restructuring firms in difficulty, and aid for the deployment of broadband networks.

The horizontal rules are not exemptions; they are the rules which the Commission applies when it decides whether or not to approve any proposed aid. Even if it meets all the conditions in the relevant horizontal framework or guideline, the proposed aid must be notified to the Commission and its approval (or a decision that it does not constitute State Aid or that the Commission will not raise any objection) obtained before the aid is awarded.

- sectoral rules which apply to different industry sectors. They take precedence over the horizontal rules, the GBER and the *de Minimis* Regulation. They contain special rules relating to the following sectors: agriculture, audio-visual production, broadband, broadcasting, coal, electricity, financial, fisheries, postal services, shipbuilding, steel, synthetic fibres and transport. These are not exemptions: aid under the sectoral rules must be notified to the Commission and its approval (or a decision that it does not constitute State Aid or that the Commission will not raise any objection) obtained before the aid is awarded.
- specific aid instruments, such as the rules on guarantees, the sale of land and buildings and export credit insurance;
- the rules on reference rates, discount rates and recovery interest rates; and
- the rules on aid for services of general economic interest (SGEIs).

The State Aid rules which universities are most likely to find useful are:

- a) the *de minimis* Regulation;
- b) the General Block Exemption Regulation (the GBER); and
- c) the Research and Development and Innovation (the R&D&I) Framework.

Each of these is looked at in more detail below.

Establishing the Market Rate

IN A NUTSHELL

If the recipient of goods or services pays the full market rate for them, it will not be in receipt of State Aid.

So there will be no aid to an undertaking where the university charges a market rate for its services.

While Full Economic Costing is a helpful method of establishing a baseline cost for charging, it is not necessarily the equivalent of market rate.

THE DETAIL

Because a transaction carried out on a commercial basis will not involve aid, establishing the market rate for any particular goods or services can be very important if later there is a complaint that the State Aid rules have been broken.

When goods and services are bought in by a university, the market rate is usually established by competitive tender using a fair and open procedure, and in accordance with the Public Contracts Regulations 2015 where they apply.

When a university provides services or facilities, unless in response to a competitive tender, the university should, wherever possible, find out using information in the public domain what the market rate is for the provision of similar services or facilities and ensure that it does not charge less than that.

But the absence of a tender procedure and an expert evaluation will not automatically mean that there is State Aid.

It is interesting to look at how the Commission viewed a software licence agreement between the Dutch Technische Universiteit Delft (TUD) and the company Delftship BV (DS). The software had been developed by an engineer and a TUD lecturer who left the university and founded DS. TUD did not have the means to continue developing that software. TUD granted DS an exclusive licence under which DS would develop the software, supply TUD with updates free of charge and pay TUD an annual royalty of 5% of the annual turnover received by DS from the sub-licensing of the software. The Commission looked at the negotiations between TUD and DS and concluded that because TUD had managed to improve its contractual position and had taken several factors into consideration (importantly that, because of the experience of the engineer who developed the software, DS was best qualified to continue developing the software and to adapt it to TUD's needs), the 5% royalty was a market rate. That was the case even though the market price had not been established by going out to tender or valuation by an independent expert, but bear in mind that the 5% was considered the market rate in the particular circumstances of the case and the market rate will vary from case to case.

In the context of collaborative research, the Commission deems the compensation received by the university to be the equivalent of the market price if one of the following conditions is met:

- i) the amount of the compensation has been established by means of an open, transparent and non discriminatory competitive sale procedure;
- ii) an independent expert valuation confirms that the amount of the compensation is at least equal to the market price;
- iii) the university can demonstrate that it effectively negotiated the compensation, at arm's length, to obtain the maximum economic benefit when the contract was concluded, while considering its statutory objectives; or
- iv) if the collaboration agreement gives the undertaking a right of first refusal in relation to IPR generated by the university, the university exercises a reciprocal right to solicit more economically advantageous offers from third parties so that the undertaking has to match its offer accordingly. (In practice, one may conclude that putting this into effect could be challenging).

In the context of contract research, the university should charge the market price but, if the market price cannot be established, the Commission will usually accept that the market price has been charged where the price charged is the result of arm's length negotiations in which the university negotiated to obtain the maximum economic benefit when the contract was concluded, and at least the university's marginal costs are covered.

If the university provides a specific service for the first time on behalf of a given undertaking, on a trial basis and during a clearly limited period of time, the Commission will normally consider the price charged to be the market price where that contract research is unique and it can be shown that there is no market for it.

The Commission has issued specific guidance on the procedures to be followed when selling land and buildings in order to avoid the existence of State Aid. This can be found at: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y0710\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y0710(01)&from=EN).

State Aid and full economic costing (fEC)

There may well be no correlation between fEC and the market rate or market price which is used to determine whether or not an undertaking receives an advantage for the purposes of State Aid. The market rate or price for any individual project could exceed the fEC by some margin or fEC may, in a depressed market, represent more than the market rate. In the latter case, provided an undertaking pays at least fEC, there will be no State Aid issue because the recipient of any asset or service created or acquired with public funding will be paying more than the market rate or price.

TRAC (the Transparent Approach to Costing) is the standard method used for costing in UK universities. This methodology is accepted by the UK government and major UK funders of research as a method of costing and much research funding is now based on TRAC-derived costs, known as full economic costs or fEC. A major feature of the fEC methodology is to ensure that the costing of each project contains an element to sustain the research base in the long term. Current Government guidance on TRAC (2014-15) can be found at: <http://www.hefce.ac.uk/funding/finsustain/trac/>.

The fEC of a project is made up of directly incurred costs, directly allocated costs, and indirect costs (the latter two types of cost use the rates produced from the annual TRAC process). Directly incurred costs are recorded on the basis of actual expenditure whereas directly allocated and indirect costs are recorded on the basis of standard costs established at the time of project approval.

Full Economic Costs, as the name suggests, represent the true costs to the university of carrying out a particular piece of work, e.g. a research project. HEFCE expects universities, taking one year with another, to recover, in aggregate, the full costs of all their activities across the full range of their activities.

Under the R&D&I Framework, in order to avoid State Aid being granted to an undertaking for which a university carried out contract research, the Commission looks for the contract research to be charged at the market price. If there is no market price, the price charged by the university should reflect the full costs of the service and include a margin established by reference to those margins commonly applied by undertakings active in the same sector.

The conclusion is that the calculation of fEC should not determine an assessment of whether or not the market rate or price is being paid, and that rate or price should be established independently of fEC.

Approved State Aid Schemes

IN A NUTSHELL

The European Commission can approve schemes put forward by EU Member States to allow State Aid to be given without prior notification and without being unlawful.

There are few approved schemes in the UK, but Innovate UK has an approved scheme which covers its grants for R&D.

The Commission encourages the use of the GBER and the *de Minimis* Regulation rather than the submission of new schemes for approval.

THE DETAIL

An approved State Aid scheme is one which has been notified to and approved by the Commission. The approval will contain conditions which must be met if any State Aid is to be granted under the scheme.

Very few UK schemes which are relevant to universities have been notified to the Commission. The Commission's policy is to encourage use of the GBER primarily and the *de Minimis* Regulation as a last resort where the GBER is unsuitable or where the amounts of aid concerned are limited.

The 'Technology Strategy Board Research, Development and Innovation scheme' provides the State aid coverage for the majority of support provided by Innovate UK in line with the General Block Exemption Regulation. See further details at: <https://interact.innovateuk.org/documents/1524978/2138994/Innovate%20UK%20Research%2C%20Development%20and%20Innovation%20scheme>

Other schemes which may be useful and are registered under GBER are:

- Energy Storage and Component Research and Feasibility Study Scheme (DECC funded) (SA.39406); and
- the English Research, Development and Innovation State Aid scheme (ERDF funded) (SA.39161).

A list of Scottish approved schemes, all of which, at September 2015, have cover under the GBER (together with links to the details of each scheme) can be found at: <http://www.gov.scot/Topics/Government/State-Aid/if-its-aid/Approved-schemes>

A list of Welsh approved schemes approved under the GBER (together with links to the details of each scheme) can be found at: <http://wales.gov.uk/topics/businessandconomy/stateaid/schemes/?lang=en>

CASE STUDY - Collaboration via a Knowledge Transfer Partnership, KTP project award

Scenario: A local biotechnology company, an SME, is partnering with the university's Department of Applied Biology in a KTP programme. The KTP Associate is based with the company for the majority of her time, as the scheme demands. Project funding is mostly provided by the government through Innovate UK, with the SME providing a percentage of the cash needed for the project.

The terms of the agreement between the university and the company assign ownership of all the project results to the company, but there is provision for the payment of royalties to the university in the event that the company is successful in commercially exploiting the project results. The company must demonstrate reasonable and timely progress in commercial exploitation of the results or, in the absence of that progress, the company can be obliged to reassign ownership of the project results to the university.

The university supervisor will be entitled to publish the project results in the form of academic papers (subject to review and approval of the company) in conjunction with the KTP Associate.

Comment: The UK KTP (formerly known as the Teaching Company Scheme, TCS) is a long-established mechanism which underpins a wide variety of projects between HEIs and companies (including not-for-profit companies, and public sector organisations).

Innovate UK grants State Aid under a State Aid GBER Scheme which has been approved by the Commission and covers the whole of the Innovate UK portfolio (State Aid scheme SA.40761.)

The aid must comply with the specific conditions set out in that scheme and the general conditions of the GBER. Collaborative arrangements which provide for a fair and reasonable financial return to the university partner in the event that arising intellectual property is successfully commercialised and allow the academic partner to publish project results in relevant journals and other media are an acceptable arrangement and are compliant.

The De Minimis Regulation

IN A NUTSHELL

It is generally lawful for an undertaking to receive aid not exceeding €200,000 (€100,000 in the road transport sector) over a period of 3 fiscal years.

Before granting any de minimis aid, you should carry out a due diligence exercise to ensure that the aid (together with any other de minimis aid received by the undertaking) does not exceed this threshold.

Accurate records of all de minimis aid awarded must be kept and procedures followed to inform the recipient of the nature of the aid.

THE DETAIL

This is Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid. The full text of the new regulation (Commission Regulation 1407/2013, OJ L352/1, 24.12.2013) can be seen here: http://ec.europa.eu/competition/state_aid/legislation/de_minimis_regulation_en.pdf

The Commission takes the view that small amounts of aid (*de minimis*) do not have a potential effect on competition and trade and are therefore not State Aid.

The *de minimis* Regulation allows the award of State Aid which (when added to all other *de minimis* State Aid received by the beneficiary) does not exceed €200,000 (or €100,000 in the road transport sector) (gross cash equivalent value) over three fiscal years without having to notify the Commission before that aid is granted if all the conditions set out in the *de minimis* Regulation are met.

The sterling equivalent is calculated using the Commission exchange rate applicable on the written date of offer of the *de minimis* funding.

The conditions include obtaining a declaration about other *de minimis* aid received by the beneficiary during the current and the previous two fiscal years and notifying the beneficiary of the nature of the aid.

If wanting to grant aid under the *de minimis* Regulation, you should consider that there may be fewer potential recipients because an undertaking may receive *de minimis* aid from a number of sources and the €200,000 threshold can quickly be exceeded. Using the GBER may be a better alternative.

Because of the low €200,000 threshold the possibility of coming within the *de minimis* Regulation may often not be available except for some smaller projects.

De minimis aid cannot be used as a way of “topping up” other types of aid for the same thing. For instance, if under the GBER a particular project is only entitled to aid equivalent to 50% of its eligible costs, the additional 50% cannot be covered by *de minimis* aid.

Procedures for complying with the *de Minimis* Regulation

Before granting *de minimis* aid you should:

1. Check that the *de minimis* aid to be granted does not take the total level of *de minimis* aid over the *de minimis* threshold

That involves obtaining details from the beneficiary about other *de minimis* aid received during the current and previous two fiscal years, and obtaining a written declaration from the beneficiary. Even if the proposed beneficiary has not received any *de minimis* aid in the last three fiscal years, you should still obtain a written declaration to that effect.

2. Check that the undertaking is eligible to receive *de minimis* aid

De minimis aid must not be granted to undertakings active in the fishery and aquaculture sector, the primary production of agricultural products, the sector of processing and marketing of agricultural products or for export-related activities or the use of domestic over imported goods.

3. Notify the beneficiary about the *de minimis* aid
Inform the beneficiary in writing:

that the aid is *de minimis* aid, making express reference to the *de minimis* Regulation, that is Commission Regulation (EU) 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union published in the Official Journal of the European Union on 24 December 2013; and

of the amount of the aid expressed as gross cash equivalent, i.e. before deduction of taxes and other charges.

4. Maintain an up to date *de minimis* aid register

The Commission may request information to demonstrate compliance with the *de Minimis* Regulation, and the Department for Business, Innovation and Skills (BIS) has only 20 working days in which to comply with that request. If BIS and/or the relevant devolved government unit cannot provide the details to the Commission, the UK may lose the ability to award *de minimis* aid in future.

In order to protect the university, you should ensure that *de minimis* aid is given only after the beneficiary has signed a declaration that it has not received other aid in the past three years which would take it over the *de minimis* threshold.

CASE STUDY - Providing consultancy advice to SMEs as part of a programme supported by public funding (Part 2 – aid to the SMEs)

Scenario: The university's Business School has established a High Performance Programme to advise SMEs on lean thinking methodologies.

Possible aid to the university was explored earlier in Part 1 of this case study.

Aid to the SMEs

Although they receive no money, the SMEs will receive an advantage (and therefore State Aid) through the university report analysing their production processes.

The value of that report is low and could come within the *de minimis* Regulation provided the recipient will not receive more than €200,000 in *de minimis* aid over three fiscal years. The university will have to take steps to check the eligibility of the SMEs for *de minimis* aid and put the appropriate procedures and paperwork in place. (See above.)

The consultancy provided to the 25 SMEs may also be State Aid if it is supported by the grant from the regional government or university resources are used to provide it. It could be handled in one of two ways:

1. the university could charge a market rate and avoid there being any State Aid to the SMEs at this point; or
2. the consultancy could be structured to come within Article 18 of the GBER (Aid for consultancy to SMEs) which allows up to 50% of the costs of consultancy to be provided without the need to notify the Commission in advance (see Appendix 1.)

The General Block Exemption Regulation (the GBER)

IN A NUTSHELL

This regulation permits 13 categories of aid without the need to notify the proposed aid to the Commission in advance, provided certain conditions are met.

The Commission must be notified within 20 days of the grant of aid under the GBER unless the aid is awarded under an approved GBER scheme.

THE DETAIL

This is Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty. The full text is available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0651&from=EN>

The GBER permits State Aid if that aid falls within one of the 13 categories in the GBER (which include aid for research and development and innovation in section 4) without the need to notify the Commission before the aid is granted if all the relevant conditions set out in the GBER are met.

The GBER does not provide a complete exemption in respect of State Aid but rather an exemption from the more formal notification process. Although aid under the GBER does not need to be notified to the Commission before the aid is granted, information about the aid must be sent to the Commission within 20 working days of a scheme starting or of ad hoc aid (that is, aid not made under an approved scheme) being granted under the GBER.

The GBER does not apply unless the general conditions are met. There are a number of these, including:

- the aid should be transparent (if the aid is not in the form of a cash grant, the gross grant equivalent must be calculated);
- there must be an incentive effect (see below);
- only eligible costs are funded;
- only a specified percentage of the eligible costs (known as the aid intensity) is funded;
- aid over a certain amount (the maximum amount) is not granted; and
- the beneficiary is not an undertaking in difficulty and there is no active order against it for the recovery of unlawful State Aid.

There is a full list of the general conditions in the checklist available on the Welsh Government's website (see the 'how to' guide on the GBER):

<http://gov.wales/funding/state-aid/gber/?lang=en>

In the case of aid to an SME, an incentive effect is presumed by the GBER if the beneficiary submits the application for aid (containing the information in Article 6 of the GBER) before the activity or project starts.

In the case of ad hoc aid to a large enterprise, the beneficiary must submit the application for aid before the activity or project starts and, before any aid is granted, the beneficiary must prepare documentation which establishes at least one of the following:

- a material increase in the scope of the project/activity as a result of the aid;
- a material increase in the total amount spent by the beneficiary on the project/activity as a result of the aid;
- a material increase in the speed of completion of the project / activity.

The categories of aid included in the GBER are:

1. Regional aid;
2. Aid to SMEs (investment aid*, aid for consultancy*, aid for participation in fairs and aid for costs incurred on participating in European Territorial Cooperation);
3. Aid for access to finance for SMEs (risk finance aid*, aid for start-ups*, aid to alternative trading platforms and aid for scouting costs);
4. Aid for research and development and innovation (including investment aid for research infrastructures, aid for innovation clusters and aid for R&D projects);
5. Training aid;
6. Aid for disadvantaged workers and for workers with disabilities;
7. Aid for environmental protection;
8. Aid to make good the damage caused by certain natural disasters;
9. Social aid for transport for residents of remote regions;
10. Aid for broadband infrastructures;
11. Aid for culture and heritage conservation;
12. Aid for sport and multifunctional recreational infrastructures; and
13. Aid for local infrastructures.

Categories 2, 3, 4, and 5 are most likely to be relevant to universities, so details of these (in the case of 2 and 3 only those with a *) are set out in Appendix 1 but, where relevant, other categories should be considered.

Risk finance aid must be made through a scheme administered by a financial intermediary and the GBER should be considered in the context of a university seed or investment fund.

There are different eligible costs, aid intensities and thresholds or maximum amounts for each category and these must be checked before any aid is granted under the GBER.

BIS has published guidance on the GBER which is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/325465/bis-14-943-state-aid-general-block-exemption-guidance.pdf.

CASE STUDY - Postgraduate research: PhD Studentships co-funded by a UK Research Council and industry under a CASE (Collaborative Awards in Science & Engineering) model

Scenario: A university's Department of Engineering has secured an industrial partner for a PhD studentship in aerospace materials. The project is mainly funded from the University's Engineering & Physical Sciences Research Council (EPSRC) Doctoral Training Partnership. The industrial partner is providing cash support at the minimum level required, equivalent to one third of the EPSRC funding. The industrial partner has some background intellectual property in broadly the same technology area as the studentship and is requesting ownership of the results which arise from the project. The original idea for the PhD project was generated by the university academic supervisor. The PhD student will be entitled to publish the project results in the form of academic papers and in his PhD thesis.

Comment: CASE is a long-established and successful model for university-industry collaboration. Although no public money flows to the industrial partner, resources funded by the state (in the form of the student who will be placed with the industrial partner and intellectual property rights in the results of the project if they are accessed by the industrial partner) will provide an advantage to the industrial partner.

Under a standard model of assessing State Aid, if the industrial partner pays the market rate for the resources there will be no advantage to the industrial partner, but in this case the industrial partner is contributing perhaps one quarter of the overall project costs and some background IPR. On the face of it, the industrial partner is receiving an advantage. That advantage is selective – it is granted only to the industrial partner, and the competitive position of the industrial partner will be strengthened. It is difficult to argue that there will be no effect on trade between member states of the EU.

In the case of CASE studentships there is no specific State Aid scheme in place which has been approved by the European Commission. Under Article 25 of the GBER (R&D Projects) the aid intensity for industrial research is 60% or 70% in the case of medium enterprises and small enterprises respectively, and those percentages may be increased by 15 percentage points (up to a maximum of 80%) if there is effective collaboration between an undertaking and a university where the university bears at least 10% of the eligible costs and has the right to publish its own research results and the results of the project are widely disseminated. (See Appendix 1.)

Effective collaboration takes place where at least two independent parties undertake a project where they pursue a common objective, jointly defined, they both contribute to its implementation and share its financial, technological, scientific and other risks, as well as its results. The publication by the student of their thesis and/or academic papers should satisfy the requirement for wide dissemination.

The key considerations here are that the legal arrangements which govern the studentship should be equitable and reflect the fact that most of the project funding is being provided by the public purse. Appropriate arrangements should not provide a disproportionate benefit to the collaborating company. Suitable terms would give the company the opportunity to access arising intellectual property rights by paying a fair and reasonable compensation to the university. Results should be publishable by the student and university, subject to the minimum of delay in order to safeguard legitimate commercial interests.

Note: Industrial CASE awards are projects where the Research Council funding is allocated to a business and the business then seeks out an academic institution to work with. In these instances the Research Council element funding is still a Government grant (public funding), hence the recommendations above are still valid.

CASE STUDY - University ownership and operation of innovation-focused facilities: establishing a business incubator for the life-science sector

Scenario: Working closely with its city, region and Local Enterprise Partnership a university has identified a lack of suitable, local accommodation for high-technology businesses with a life science focus. The university has struggled to identify suitable accommodation for two of its own spin-out companies which were based on research carried out in the Department of Biology. Given this market demand, the university has secured financial support via a loan facility in order to build an incubator facility on a brownfield site adjacent to its science campus and in close proximity to the Department of Biology. Co-investment for the project has been provided by a multi-million pound government grant for innovation infrastructures.

The university now has a number of potential tenants for the building. These include the following: i) one or two relevant research groups which will remain part of the university; ii) some of the university's spin-out companies in which it holds an equity stake and where members of its academic staff may hold directorships; iii) small, independent R&D focused companies (SMEs) which would potentially benefit greatly from the proximity to the university campus and academic expertise; and iv) discrete research teams from larger, multi-national companies with which the university is looking to establish strategic partnerships.

The university is considering how it should structure the rents it charges to these different sorts of tenants.

Comment: Universities are increasingly finding themselves (indeed, positioning themselves) as landlords with research and development focused tenants. Typically, purpose built innovation facilities are managed as trading entities (i.e. undertakings) owned by the university. Sometimes the management company is jointly owned with, for example, local authorities and city councils which also take equity and provide strategic direction. Funding for incubators is an appropriate use of public resources where it facilitates the commercialisation of university research (including publicly funded research) and supports the growth of local economies by providing appropriate accommodation for early stage technology based businesses.

Aid to the university

In operating the incubator, the university will be carrying out an economic activity and the government grant will be State Aid to the university.

However, under Article 27 of the GBER, aid for the construction or upgrade of innovation clusters is exempt from prior notification to the Commission if:

- the aid is granted exclusively to the university as the legal entity operating the incubator;
- access to the premises, facilities and activities is open to several users and is granted on a transparent and non-discriminatory basis; and
- the fees charged for using the facilities and for participating in the incubator's activities correspond to the market price or reflect their costs.

The aid intensity must not be more than 50% of the eligible costs, but it may be increased in assisted areas. Operating aid in the form of personnel and administrative costs (including overhead costs) may be granted for not more than 10 years. The GBER will not apply if the aid is more than €7.5 million. The profit from the letting of the incubator should be returned to the university and used for its primary purpose (charitable) activities (e.g. fundamental research).

University research groups

The university may accommodate one or more of its own (primary purpose) research activities in the incubator free of charge. These groups are not carrying on an economic activity and will not, therefore, be recipients of State Aid.

University spin-out companies

The rent charged to a university spin-out should be the same as those charged to other SMEs and start-ups, with no special discount or advantage conferred on the spin-out company.

SMEs

The rent charged to SMEs should normally be at a market rate, but schemes to encourage SMEs to take up space in incubators, e.g. a fixed-term, low rent 'honeymoon period', are legitimate if this is in accordance with general market conditions.

Alternatively a discount may be given in the form of *de minimis* aid, provided the university puts in place the proper procedures and paperwork to ensure that it complies with the conditions of the *de Minimis* Regulation. If it decides to go down this route, the university must be careful to comply with the GBER condition that the fees charged should reflect the costs, otherwise the grant to the university may not come within the GBER.

Research teams from large, multi-national companies

Space and facilities in the incubator should be let at a market rate.

The arrangements may be more complicated if, for instance, a company has contributed to the capital development costs in order to ensure that accommodation and facilities meet its specific requirements. In that case, that contribution can be taken into account when setting the rent - Article 27 of the GBER provides for an undertaking which has financed at least 10% of the investment costs of an innovation cluster to be granted preferential access under more favourable conditions, provided that access is proportional to the undertaking's contribution to the investment costs.

The R&D&I Framework

IN A NUTSHELL

The Framework does not create any exemptions as such.

The Framework's main purpose is to explain the approach that the Commission will take when assessing proposed aid for Research, Development and Innovation which is not covered by the GBER.

The Framework is also helpful in that it sets out the Commission's thinking on State Aid and universities, particularly in the areas of collaborative and contract research.

The R&D&I Framework is the Framework for State Aid for research and development and innovation (2014/C 198/01).

The full text is available at:

http://ec.europa.eu/competition/state_aid/modernisation/rdi_framework_en.pdf.

It relates to aid for:

- a. R&D projects where the aided part of the project is fundamental research, industrial research or experimental development;
- b. feasibility studies related to R&D projects;
- c. the construction and upgrade of research infrastructures;
- d. innovation activities and
- e. innovation clusters, which does not come within the GBER.

Unlike the GBER, meeting the conditions set out in the R&D&I Framework does not provide an exemption from notifying the Commission before the aid is granted.

The purpose of the Framework is to inform the public of the criteria which the Commission will apply if proposed State Aid is notified to the Commission and the Commission has to decide whether or not to permit that aid. In making that assessment the Commission balances the positive impact of the aid in reaching an objective of common interest against its potentially negative effects of distorting trade and competition.

The Framework does not provide criteria which the public may use to decide whether or not there is any State Aid or whether that aid is permissible; even if it meets the conditions in the Framework, the proposed aid should be notified to the Commission and the Commission's approval (or a decision that it does not constitute State Aid or that the Commission will not raise any objection) obtained before the aid is provided.

The Framework should be consulted when considering notification; coming within its conditions will allow the simplified procedure to be used. But you should consult the Department for Business Innovation and Skills (BIS) State Aid team (or, initially, your regional government State Aid unit) if you are considering notifying any State Aid.

The Framework talks in terms of undertakings and research organisations (such as universities, research institutes, technology transfer agencies, innovation intermediaries, research-oriented physical or virtual collaborative entities) and research infrastructures (facilities, resources and related services which are used by the scientific community to conduct research) but, for the sake of simplicity, this guidance simply refers to universities.

Direct and Indirect State Aid

The Commission will not consider the university to be a beneficiary of State Aid if the university acts only as an intermediary which:

- a. passes on all the advantages to the final recipients, e.g. through reduced prices; and
- b. obtains no further advantage because it has been selected through an open tender procedure or the public funding is available to anyone who satisfies the necessary objective conditions, so that the final recipients may acquire equivalent services from any intermediary who satisfies those conditions.

But in those circumstances, there is likely to be indirect State Aid to the final recipients.

There may also be indirect State Aid to an undertaking where an undertaking obtains an advantage in the context of a university carrying out contract research for it, or the undertaking and a university carrying out collaborative research.

In that case the university may be an awarder of State Aid and it should ensure that that aid complies with the State Aid rules, preferably coming within the GBER or the *de minimis* Regulation.

The university will also not be considered a beneficiary of aid where

- a. its economic activities consume exactly the same inputs (e.g. material, equipment, labour and fixed capital) as the non-economic activities; and
- b. the capacity allocated each year to the economic activities is not more than 20% of the "relevant entity's" overall annual capacity (see previous explanation).

Contract Research

Where a university provides research services to an undertaking (i.e. carries out contract research), there will usually be no indirect State Aid to the undertaking if the university receives adequate remuneration for its services. This applies in particular where one of the following conditions is met:

- a. the university carries out the contract research at market price; or
- b. where there is no market price, the university carries out the contract research at a price which:
 - i.. reflects the full costs of the service and includes a margin established by reference to those margins commonly applied by undertakings active in the same sector as the service; or
 - ii. is the result of arm's length negotiations where the university has negotiated to obtain the maximum economic benefit when the contract was concluded and at least the university's marginal costs are covered.

If the university provides a specific service for the first time on behalf of a given undertaking, on a trial basis and during a clearly limited period of time, the Commission will normally consider the price charged to be the market price where that contract research is unique and it can be shown that there is no market for it.

If ownership of, or access rights to, intellectual property rights remain with the university, their market value may be deducted from the price payable for the contract research.

Collaborative Research

This involves effective collaboration.

The terms and conditions of the project (in particular contributions to its costs, the sharing of risks and results, the dissemination of results, access to and rules for the allocation of IPR) must be concluded before the start of the project.

This does not mean that there has to be definite agreement on the market value of the resulting IPR and the value of the parties' respective contributions to the project.

Where there is effective collaboration carried out jointly by an undertaking and a university, there will usually be no indirect State Aid to the undertaking if at least one of the following conditions is met:

- a. the undertaking bears the full cost of the project (not necessarily the same as paying full economic costs, as outlined previously);
- b. the results of the collaboration which do not give rise to IPR may be widely disseminated and any IPR resulting from the activities of the university is fully allocated to the university;
- c. any IPR resulting from the project and access rights are allocated between the collaborators so as to reflect adequately their work packages, contributions and respective interests;
- d. the university receives compensation equivalent to the market price for the IPR which results from its activities and which is assigned to the undertaking, or to which the undertaking is allocated access rights. The value of any contribution (financial and non-financial) of the undertaking to the costs of the university's activities that resulted in the IPR, may be deducted from that compensation.

For the purposes of d) above, the compensation received by the university will be deemed equivalent to the market price if one of four conditions is met – see above on establishing the market rate in the context of collaborative research.

If none of the conditions in a) – d) above is met, the full value of the contribution of the university to the project will be considered an advantage to the undertaking, and the State Aid rules will apply.

Assessment by the Commission

The Commission has the power to declare that State Aid is compatible with the internal market and is therefore be permitted if the aid meets the criteria in Article 36 of the Framework:

- it makes a contribution to a well-defined objective of common interest;
- there is a need for state intervention;
- the aid is appropriate to address the objective of common interest;
- the aid has an incentive effect – it changes the behaviour of the undertaking so that it engages in activity which it would not carry out without the aid or would carry out in a restricted or different manner or location;
- the aid is proportionate - the amount and intensity of the aid does not exceed the minimum needed to induce the additional investment or activity by the undertaking;
- the negative effects of the aid are sufficiently limited so that the overall balance of the aid is positive; and
- the aid is transparent - Member States, the Commission, economic operators, and the public, have easy access to all relevant acts and to pertinent information about the aid.

In section 4 of the Framework (Article 41 and following) the Commission sets out how it will apply the above criteria.

Aid intensity and eligible costs

In order to ensure that the aid is proportionate, it must relate to the eligible costs (set out in Appendix 2), and each task carried out under the project must fall into the category of:

- fundamental research;
 - industrial research; or
 - experimental development.
-

The aid must be no greater than a specified proportion of the eligible costs set out in Appendix 2. This is called the aid intensity. The aid intensity for each undertaking which receives State Aid must be established.

The maximum permitted aid intensity depends on:

- i. the closeness of the aid to the market;
- ii. the size of the undertaking which receives the aid; and
- iii. the acuteness of the market failure.

Aid intensities are generally lower for activities linked to development and innovation than they are for research activities.

The combination of direct public support and, where they constitute aid, contributions from universities to the same project must not exceed the applicable aid intensity for each undertaking which receives aid.

Aid for R&D&I may not be cumulated with *de minimis* aid (see above) in respect of the same eligible costs if that would result in the aid intensity exceeding the limits in the Framework.

If you wish to use the Framework, the proper procedure is to:

- a use the guidance provided by the Framework to bring the project into line with the:
 - i circumstances outlined in the Framework where the Commission has stated that there will be no State Aid; or
 - ii criteria which the Commission uses to determine that the aid is permissible; and

b approach the Commission so that the Commission may:

- i apply the principles in the Framework and decide that there is no State Aid; or
- ii if the Commission decides that there is State Aid, assess whether the aid is compatible with the internal market and should be permitted.

It can take a long time for the Commission to reach any decision and the Commission may well take the opportunity to look at other potential State Aid issues.

Unless the participants in the project have the appetite to approach the Commission for a decision under the Framework, the solution is to ensure that either:

- a there is no State Aid because one of the State Aid tests is not met; or
- b the terms of the project are such that any State Aid complies with the conditions under which State Aid is permitted without the need to notify the Commission before the aid is granted. In practice that will mean complying with the *de minimis* Regulation or the GBER.

CASE STUDY - a collaborative industrial research project with part funding from Innovate UK

Scenario: The university's Department of Geology was contacted by a company which provides services to the oil and gas industry. The company has established a consortium to develop new software tools to support exploration geology and the discovery of new oil reservoirs and subsequently led a successful bid to Innovate UK for Collaborative R&D project funding.

The companies in the consortium receive cash funding directly from Innovate UK, based on a percentage of the eligible R&D costs which they each incur.

The university receives government funding at 80% of fEC in payment for its part in the project (hence the university makes a quantifiable contribution to the costs of the project).

The results of the project will be owned by the exploration company and there is an obligation on that company to pay a royalty to the university on sales or licences of any software product which is based on the project results.

The university supervisor will be entitled to publish the project results in the form of academic papers.

Comment: The Collaborative R&D Scheme from Innovate UK has been approved by the European Commission through the General Block Exemption Regulation (GBER) hence these grants constitute State Aid but are offered under a registered scheme. The single scheme covering the whole of the Innovate UK portfolio is State Aid SA.40761.

Aid intensities are defined under the scheme (for fundamental research, industrial research, experimental development and feasibility studies). The expectations around how a collaboration is structured vary according to the type of R&D carried out, as detailed under the scheme. In general, the expectation is that the parties should receive benefit commensurate with their input to the project and that the results should be disseminated and published by the academic partners (with due regard to confidentiality and protecting commercial interests). The arrangements proposed in the example above would meet these requirements.

CASE STUDY - Establishing a major research infrastructure for shared use by universities

Scenario: The university is awarded a government grant for £20million to provide supercomputing facilities which will be available to the wider higher education community for the support of research projects.

This is aligned with current government expectations that universities should work together to deliver and make best use of shared access facilities, often on a regional consortium basis. This is in order to avoid duplication in terms of the availability of equipment and to maximise utilisation rates, driving up efficiency in the HE sector.

The university carries out a full OJEU tendering process and awards a contract to a supplier, which undertakes the installation and commissioning of the equipment.

The computing facilities will be made available by the university to other universities and not-for-profit research organisations for the purposes of carrying out fundamental research, supported by government grants through RCUK, the European Commission and research funding charities.

There is a possibility that the university will make the facilities available to the private sector.

Comment: We need to consider:

- the supplier of the equipment as a recipient of State Aid;
 - the university as a recipient of State Aid in the form of the government grant;
 - the other universities and institutions which use the facilities as indirect recipients of State Aid; and
 - any undertakings which use the facilities as indirect recipients of State Aid.
-

The supplier

As the supplier was selected following a full tender process, it will not be paid more than the market rate for the equipment and associated services and will not be a recipient of State Aid.

The university

The university will operate the facility in pursuit of a primary purpose activity (charitable research), the results of which are widely disseminated. Therefore the university will not be a recipient of State Aid in the form of the government grant.

If the university allows undertakings to use the facilities, the university will be carrying out an economic activity (renting out the facility) which has been funded by the state. There will therefore be an element of State Aid to the university unless the facilities are used almost exclusively for non-economic activities and any economic activity is purely ancillary (i.e. they consume exactly the same equipment, labour and fixed capital) as the non-economic activities the capacity allocated each year to the economic activities is not more than 20% of the facility's overall annual capacity.

The other universities

The other universities and not-for profit research organisations will be using the facilities for non-economic activities and therefore will not be in receipt of State Aid provided they disseminate the results of their research.

State Aid has no bearing on the basis on which the university charges the other universities and not-for profit research organisations for access to the facilities. Typically the university will seek to recover Full Economic Costs but, even if it elected not to do so, any advantage received by the other universities and not-for profit research institutions will be in support of non-economic activities and therefore not normally regarded as State Aid.

The companies

If an undertaking uses the facilities, there will be no State Aid to that undertaking if it pays the market rate for that use.

Alternatively there will be no State Aid to an undertaking using the facilities if it and the university carry out a research project involving effective collaboration and, if the undertaking does not bear the full costs of the project, the results of the collaboration which do not give rise to IPR are widely disseminated and any IPR resulting from the activities of the university is fully allocated to the university, any IPR resulting from the project and access rights are allocated between the university and the undertaking so as to reflect their work packages, contributions and respective interests, or the university receives compensation equivalent to the market price for the IPR which results from its activities and which is assigned to the undertaking.

A STEP BY STEP APPROACH TO DECIDING WHETHER THERE IS STATE AID AND WHETHER IT NEEDS TO BE NOTIFIED TO THE EUROPEAN COMMISSION

1. Are you using state funding or resources?

If you are not in receipt of money or resources provided or allocated by the state or an arm of the state (directly or through an intermediary), there will be no State Aid.

2. If the answer to step 1 is yes, are you using state resources only for the university's primary activities or are you undertaking an economic activity?

See the section "Universities and State Aid - Economic and Non-Economic Activities" above. State funding of the university's primary activities is not generally State Aid.

3. Are you using state resources to provide goods or services to a third party?

If you are, that third party may be in receipt of State Aid.

4. If the answer to step 3 is yes, are you charging no less than the market rate?

If the recipient of goods or services is paying the market rate, it is not in receipt of State Aid.

5. Identify all the beneficiaries

There may be beneficiaries (or recipients of State Aid) at different levels. For instance if government funding is used to invest in a start-up or early stage company, that company is the most obvious beneficiary of the State Aid, but investors in that company will also be beneficiaries.

6. Consider whether any of the beneficiaries are undertakings (State Aid Test 1)

See State Aid test 1 above for an explanation of an undertaking and its involvement in an economic activity.

If the beneficiary is not an undertaking, the support given to it will not be State Aid.

7. If the answer to step 6 is that the beneficiary is an undertaking, decide whether the aid confers an advantage on an undertaking (State Aid Test 2).

If the aid does not confer an advantage, it will not be State Aid. If the undertaking pays the full market price, it will not be receiving an advantage.

8. If the answer to step 7 is that the aid does confer an advantage on the undertaking, consider whether the aid is selective (State Aid Test 3).

If the aid is not selective, it will not be State Aid.

9. If the answer to step 8 is that the aid is selective, consider whether the aid actually or potentially distorts competition.

If the aid does not, actually or potentially, distort competition, it will not be State Aid.

10. If the answer to step 9 is that the aid (actually or potentially) distorts competition, consider whether the aid affects trade between Member States.

If the aid does not affect trade between Member States, it will not be State Aid.

11. If the answer to step 10 is that the aid affects trade between Member States, consider whether the aid comes within an approved scheme.

If the aid does come within an approved scheme, it may be granted provided all the conditions of the scheme are met, but rarely will the aid come within an approved scheme.

12. If the answer to step 11 is that the aid does not come within an approved scheme, consider whether the aid is exempt from notification under the GBER.

If the aid does not come within an approved scheme, it may be granted provided all the relevant conditions of the GBER are met.

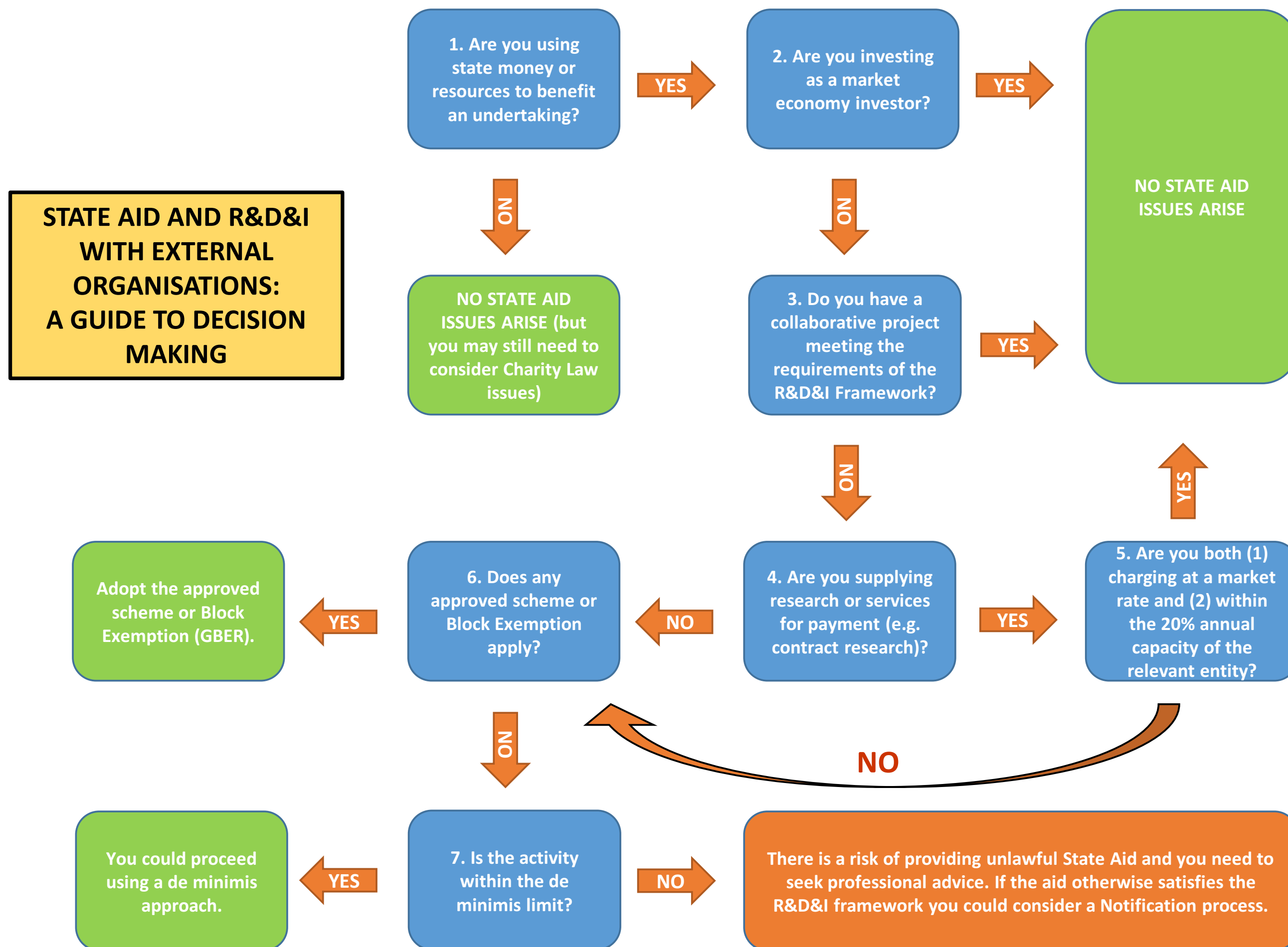
13. If the answer to step 12 is that the aid is not exempt from notification under the GBER, consider whether the aid comes within the de Minimis Regulation.

If the aid does come within the *de Minimis* Regulation, it may be granted provided all the conditions of the *de Minimis* Regulation are met.

14. If the answer to step 13 is that the aid does not come within the de Minimis Regulation, consider notifying the aid to the Commission.

To help secure a successful outcome to the notification, try to model the project so that it comes within frameworks and guidelines used by the Commission to determine whether to approve State Aid measures (e.g. the R&D&I Framework) or is analogous to earlier aid which has been approved by the Commission. It will help to consider previous decisions made by the Commission to see whether it is possible to make use of the simplified procedure. These decisions are published in the State Aid Register available at: http://ec.europa.eu/competition/state_aid/register/.

You may find it helpful to consult the following flowchart as a guide to decision making on the treatment of State Aid in research, development & innovation activities carried out in conjunction with external organisations.



NOTIFICATION

IN A NUTSHELL

Where there is State Aid but no exemption from prior notification, the aid must be notified to the European Commission and the Commission have approved it or indicated that the Commission will not raise any objection. Otherwise, the aid will be unlawful.

THE DETAIL

If, having applied the State Aid Tests, the conclusion is that:

- there is State Aid;
- that aid is not permitted under an existing approved scheme;
- that aid is not permitted under the GBER;
- that aid does not come within the *de Minimis* Regulation; and
- there are no other exemptions available,

the next step is to consider notification to the Commission. At this point you certainly need to take expert advice. Notification is a significant step which is seldom undertaken for individual university projects and there is no guarantee of success.

You should contact the Government's Department for Business, Innovation and Skills (BIS) through whom State Aid notifications are made to the Commission. Prior to this, if you are in Northern Ireland, Scotland or Wales, the respective devolved government State Aid unit should be contacted for an initial discussion. Unless an exemption to the requirement to notify applies (e.g. under the GBER), failure to notify the Commission of the proposed State Aid measure and to obtain the Commission's approval (or a decision that the Commission will not raise any objection) before the aid is granted means that the aid will be unlawful. The Commission can nevertheless approve aid retrospectively, on the basis that it is compatible with the internal market, but this should not be relied on.

In practice few notifications are made by the UK government and most State Aid is granted under the GBER.

THE CONSEQUENCES OF IGNORING OR BREACHING THE STATE AID RULES

IN A NUTSHELL

The recipient of unlawful State Aid may be ordered to pay it back with interest.

If a university is administering government funds, and it awards unlawful aid which is not recovered from the beneficiary, depending on the terms of the contract under which it is administering the funds then the university may find that it incurs the liability.

Where the university is the beneficiary, the University may be ordered to repay the aid.

Where a university is administering State Aid (e.g. ERDF funds), there will often be a condition that the university takes responsibility for ensuring that there is no unlawful aid to third parties, and the university may be liable to pay compensation if the unlawful aid cannot be recovered from a third party or if (for example) proper records have not been kept by the university.

There is a 10 year limitation period on the Commission recovering unlawful aid, i.e. the aid cannot be recovered by the Commission after 10 years has elapsed. The clock starts on the day on which the aid is awarded to the beneficiary. If any action is taken with regard to the unlawful aid by the Commission (or by a Member State acting at the request of the Commission), that 10 year period is interrupted and starts afresh, hence the limitation period can often be longer than 10 years.

The Commission can also impose fines (not greater than 1% of turnover) on an undertaking if, intentionally or through gross negligence, it provides incorrect, incomplete or misleading information.

Most breaches of the State Aid rules come to light because an aggrieved competitor of the beneficiary complains to the Commission.

Please see Appendix 5 for information about how complaints are made to the Commission and handled by the Commission, and the role of the UK courts.

THE DETAIL

The Potential Consequences

Unless an exemption to the requirement to notify applies (e.g. under the GBER or the *de Minimis* Regulation) or the aid is granted under a scheme which has already been approved by the Commission, failure to notify the Commission of the proposed State Aid measure and to obtain the Commission's approval or a decision that it does not constitute State Aid or that the Commission will not raise any objection before the aid is granted will result in the aid being unlawful. (And aid granted under a registered or notified scheme can also be unlawful, in the event that the terms and conditions of the scheme are not met.)

The Commission's aim to ensure that there is less and better targeted State Aid. It therefore takes a strict approach to unlawful and incompatible State Aid.

The consequences of unlawful State Aid can be very serious: both the Commission and the UK courts have the power to order the beneficiary to repay the aid and to pay interest.

Risk Assessment

Only the Commission (subject to the European Court of Justice) can definitively decide whether or not there is State Aid or whether any State Aid is compatible with the internal market and is therefore permitted.

But unless a proper assessment of the situation is made, it is impossible for anyone who might be granting aid or for any beneficiary to decide whether there is a need to comply with the conditions attaching to any approved scheme or State Aid rule (such as the *de Minimis* Regulation or the GBER) or whether there is a need to notify proposed State Aid to the Commission. Because unlawful State Aid may be recovered from the beneficiary, a project may be at risk if the assessment is not carried out properly.

Any assessment needs to consider both the State Aid rules and how they have been applied in practice by looking at relevant State Aid cases published at: http://ec.europa.eu/competition/state_aid/register/.

Ultimately, the decision as to what line to take may come down to the beneficiary's appetite for risk. The UK Government's 2004 paper 'Taking Account of State Aid Issues in Policy Making, A Risk-Based Approach' expressed it thus:

It is not always clear, even with experience, whether a given measure is a State Aid and, if so, how it should be treated under the rules. There may be a lack of State Aid precedents in a particular policy area, or there may even be contradictory precedents and hence conflicting legal positions on whether a measure is an aid. Perhaps because of the potential severity of the implications for getting State Aid decisions wrong, it is often easy to seek comfort by adopting a very cautious stance towards State Aids. However, this in itself can be unnecessary, and lead to the delay, or even failure to implement policies that will contribute to public bodies achieving their objectives. Government ministers have made it clear that a 'risk-based' approach to decision-making around State Aid is desirable, and that such an approach should be respectful of legal obligations while also focusing on target delivery. This means State Aid decisions should be based on what is 'credible' rather than necessarily what is 'cast-iron'.

APPENDICES

APPENDIX 1 - THE GBER

Category 2:

Aid to Small and Medium-Sized Enterprises (SMEs)

Investment aid to SMEs (Art 17 of the GBER)

Investment aid to SMEs (operating inside or outside the EU) is exempt from prior notification to the Commission if the general conditions and the following conditions are met.

Eligible costs

- a) the costs of investment in tangible assets and intangible assets consisting of:
 - i) an investment relating to the setting-up of a new establishment, the extension of an existing establishment, diversification of the output of an establishment into new additional products or a fundamental change in the overall production process of an existing establishment; and/or
 - ii) the acquisition of the assets belonging to an establishment, where the following conditions are fulfilled:
 - the establishment has closed or would have closed had it not been purchased;
 - the assets are purchased from third parties unrelated to the buyer (but this is waived where a member of the family of the original owner, or an employee, takes over a small enterprise); or
 - the transaction takes place under market conditions.

- b) the estimated wage costs for two years if the employment is directly created by the investment project.

The sole acquisition of the shares of an undertaking is not an investment for these purposes.

Intangible assets must be:

- used exclusively in the establishment receiving the aid; and
- regarded as amortizable assets; and
- purchased under market conditions from third parties unrelated to the buyer; and
- included in the assets of the undertaking for at least three years.

Employment directly created by an investment project must be:

- created within three years after completion of the investment; and
- a net increase in the number of employees in the establishment concerned, compared with the average over the previous 12 months; and
- maintained during a minimum period of three years from the date the post was first filled.

Aid intensity

- 20% of the eligible costs in the case of small enterprises; or
- 10% of the eligible costs in the case of medium-sized enterprises.

Notification Threshold

Investment aid to SMEs which exceeds the notification threshold of €7.5 million per undertaking, per investment project must be notified and is not exempt under the GBER.

Aid for consultancy in favour of SMEs (Art 18 of the GBER)

Aid for consultancy in favour of SMEs is exempt from prior notification to the Commission if it does not exceed the notification threshold, the general conditions and the following conditions are met.

Eligible costs are the costs of consultancy services provided by external consultants.

The aid intensity must not exceed 50% of the eligible costs.

The consultancy services must not be a continuous or periodic activity, nor relate to the undertaking's usual operating costs, such as routine tax consultancy services, regular legal services or advertising.

Aid for consultancy to SMEs which exceeds the notification threshold of €2 million per undertaking, per project must be notified and is not exempt under the GBER.

Category 3:**Aid for access to finance for SMEs****Risk finance (Art 21 of the GBER)**

1. A risk finance aid scheme in favour of SMEs is exempt from prior notification to the Commission if the general conditions and the following conditions are met.

Forms of aid

2. At the level of financial intermediaries, risk finance aid to independent private investors may take one of the following forms:
 - a) equity or quasi-equity, or financial endowment to provide risk finance investments directly or indirectly to eligible undertakings;
 - b) loans to provide risk finance investments directly or indirectly to eligible undertakings;
 - c) guarantees to cover losses from risk finance investments directly or indirectly to eligible undertakings.
3. At the level of independent private investors, risk finance aid may take the forms mentioned on paragraph 2 above, or be in the form of tax incentives to private investors who are natural persons providing risk finance directly or indirectly to eligible undertakings.
4. At the level of eligible undertakings, risk finance aid may take the form of equity, quasi-equity investments, loans, guarantees, or a mixture of the same.

Eligible undertakings

5. To be eligible an undertaking must be an unlisted SME (at the time of the initial risk finance investment) and fulfil at least one of the following conditions:
 - a) it has not been operating in any market;
 - b) it has been operating in any market for less than 7 years following its first commercial sale; or
 - c) it requires an initial risk finance investment which, based on a business plan prepared in view of entering a new product or geographical market, is higher than 50% of its average annual turnover in the preceding 5 years.

Follow on-investments

6. The risk finance aid may also cover follow-on investments made in eligible undertakings, including after the 7 year period mentioned above, if the following conditions are fulfilled:
 - the total amount of risk finance mentioned in paragraph 9 is not exceeded;
 - the possibility of follow-on investments was foreseen in the original business plan; and
 - the undertaking receiving follow-on investment has not become linked with another undertaking (except the financial intermediary or the independent private investor providing risk finance under the measure), unless the new entity is an SME.
- 40% of the risk finance provided to the eligible undertakings referred to in paragraph 5(b);
- 60% of the risk finance for investment provided to eligible undertakings mentioned in paragraph 5(c) and for follow-on investments in eligible undertakings after the 7-year period mentioned in paragraph 5(b).
11. Where a risk finance measure is implemented through a financial intermediary targeting eligible undertakings at different development stages and does not provide for private capital participation at the level of the eligible undertakings, the financial intermediary must achieve a private participation rate that represents at least the weighted average based on the volume of the individual investments in the underlying portfolio and resulting from the application of the minimum participation rates to such investments referred to in paragraph 10.

Maximum Amounts

7. For equity and quasi-equity investments in eligible undertakings, a risk finance measure may provide support for replacement capital only if the latter is combined with new capital representing at least 50% of each investment round into the eligible undertakings.
8. For equity and quasi-equity investments, no more than 30% of the financial intermediary's aggregate capital contributions and uncalled committed capital may be used for liquidity management purposes.
9. The total amount of risk finance must not exceed €15 million per eligible undertaking under any risk finance measure.
12. A risk finance measure must not discriminate between financial intermediaries on the basis of their place of establishment or incorporation in any Member State. Financial intermediaries may be required to fulfil predefined criteria objectively justified by the nature of the investments.

Other Conditions

13. A risk finance measure must fulfil the following conditions:
 - a) it must be implemented via one or more financial intermediaries, except for tax incentives to private investors in respect of their direct investments into eligible undertakings;
 - b) financial intermediaries, as well as investors or fund managers must be selected through an open, transparent and non-discriminatory call which is made in accordance with applicable Union and national laws and aimed at establishing appropriate risk-reward sharing arrangements whereby, for investments other than guarantees, asymmetric profit sharing must be given preference over downside protection;
10. For risk finance measures providing equity, quasi-equity or loan investments to eligible undertakings, the risk finance measure must leverage additional finance from independent private investors at the level of the financial intermediaries or the eligible undertakings, so as to achieve an aggregate private participation rate reaching the following minimum thresholds:
 - 10% of the risk finance provided to the eligible undertakings prior to their first commercial sale on any market;

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- c) in the case of asymmetric loss-sharing between public and private investors, the first loss assumed by the public investor must be capped at 25 % of the total investment;
 - d) in the case of guarantees falling under paragraph 2(c), the guarantee rate must be limited to 80% and total losses assumed by a Member State must be capped at a maximum of 25% of the underlying guaranteed portfolio. Only guarantees covering expected losses of the underlying guaranteed portfolio may be provided for free. If a guarantee also comprises coverage of unexpected losses, the financial intermediary must pay, for the part of the guarantee covering unexpected losses, a market conform guarantee premium.
14. Risk finance measures must ensure profit-driven financing decisions. This is considered to be the case where all of the following conditions are fulfilled:
- a) financial intermediaries are established according to the applicable laws.
 - b) the Member State, or the entity entrusted with the implementation of the measure, provides for a due diligence process in order to ensure a commercially sound investment strategy for the purpose of implementing the risk finance measure, including an appropriate risk diversification policy aimed at achieving economic viability and efficient scale in terms of size and territorial scope of the relevant portfolio of investments;
 - c) risk finance provided to the eligible undertakings is based on a viable business plan, containing details of product, sales and profitability development, establishing ex-ante financial viability;
 - d) a clear and realistic exit strategy exists for each equity and quasi-equity investment.
15. Financial intermediaries must be managed on a commercial basis. This requirement is fulfilled where the financial intermediary and, depending on the type of risk finance measure, the fund manager, fulfil the following conditions:
- a) they are obliged by law or contract to act with the diligence of a professional manager in good faith and avoiding conflicts of interest; best practices and regulatory supervision apply;
 - b) their remuneration conforms to market practices. This requirement is presumed to be met where the manager or the financial intermediary is selected through an open, transparent and non-discriminatory selection call, based on objective criteria linked to experience, expertise and operational and financial capacity;
 - c) they receive remuneration linked to performance, or share part of the investment risks by co-investing their own resources so as to ensure that their interests are permanently aligned with the interests of the public investor;
 - d) they set out an investment strategy, criteria and the proposed timing of investments;
 - e) investors are allowed to be represented in the governance bodies of the investment fund, such as the supervisory board or the advisory committee.
16. A risk finance measure providing guarantees or loans to eligible undertakings, must fulfil the following conditions:
- a) as a result of the measure, the financial intermediary must make investments that would not have been carried out or would have been carried out in a restricted or different manner without the aid. The financial intermediary must be able to demonstrate that it operates a mechanism that ensures that all the advantages are passed on to the largest extent to the final beneficiaries in the form of higher volumes of financing, riskier portfolios, lower collateral requirements, lower guarantee premiums or lower interest rates;
 - b) in the case of loans, the nominal amount of the loan is taken into account in calculating the maximum investment amount for the purposes of paragraph 9;
 - c) in the case of guarantees, the nominal amount of the underlying loan is taken into account in calculating the maximum investment amount for the purposes of paragraph 9. The guarantee must not exceed 80% of the underlying loan.
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17. Member States may assign the implementation of a risk finance measure to an entrusted entity.
 18. Risk finance aid for SMEs that do not fulfil the conditions laid down in paragraph 5 are exempt from the notification requirement, provided that:
 - a) at the level of the SMEs, the aid fulfils the conditions laid down in Regulation (EU) No 1407/2013; and
 - b) all the conditions laid down in Article 21, with the exception of those set out in paragraphs 5, 6, 9, 10, and 11, are fulfilled; and
 - c) for risk finance measures providing equity, quasi equity or loan investments to eligible undertakings, the measure must leverage additional financing from independent private investors at the level of the financial intermediaries or the SMEs, so as to achieve an aggregate private participation rate reaching at least 60% of the risk finance provided to the SMEs.
- For loans with a duration of between 5 and 10 years, the maximum amounts may be adjusted by multiplying the amounts above by the ratio between 10 years and the actual duration of the loan. For loans with a duration of less than 5 years, the maximum amount is the same as for loans with a duration of 5 years.
 - Guarantees with premiums which do not conform with market conditions, with a duration of 10 years and up to maximum €1.5 million of amount guaranteed (or €2.25 million for undertakings established in assisted areas fulfilling the conditions of Article 107(3)(c) of the Treaty or €3 million for undertakings established in assisted areas fulfilling the conditions of Article 107(3)(a) of the Treaty).
- For guarantees with a duration of between 5 and 10 years, the maximum amount guaranteed may be adjusted by multiplying the amounts above by the ratio between 10 years and the actual duration of the guarantee. For guarantees with a duration of less than 5 years, the maximum amount guaranteed is the same as for guarantees with a duration of 5 years.

Aid for start-ups (Art 22 of the GBER)

Start-up aid schemes are exempt from prior notification to the Commission provided the general conditions and the following conditions are met:

Eligible undertakings

Unlisted small enterprises up to five years following their registration, which have not yet distributed profits and have not been formed through a merger. For eligible undertakings that are not subject to registration, the five years eligibility period starts when the enterprise starts its economic activity or is liable to tax for its economic activity.

Forms of aid and maximum amounts

- Loans with interest rates which do not conform with market conditions, with a duration of 10 years and up to a maximum nominal amount of €1 million (or €1.5 million for undertakings established in assisted areas (fulfilling the conditions of Article 107(3)(c) of the Treaty) or €2 million for undertakings established in assisted areas (fulfilling the conditions of Article 107(3)(a) of the Treaty).
 - Grants, including equity or quasi equity investment, interests rate and guarantee premium reductions up to €0.4 million gross grant equivalent (or €0.6 million for undertakings established in assisted areas fulfilling the conditions of Article 107(3)(c) of the Treaty or €0.8 million for undertakings established in assisted areas fulfilling the conditions of Article 107(3)(a) of the Treaty).
- A beneficiary may receive support through a mix of the aid instruments referred to above, provided that the proportion of the amount granted through one aid instrument, calculated on the basis of the maximum aid amount allowed for that instrument, is taken into account in order to determine the residual proportion of the maximum aid amount allowed for the other instruments forming part of such a mixed instrument.
- For small and innovative enterprises, the maximum amounts set out above 3 may be doubled.
- Annex 1 of the GBER sets out rules for determining whether or not a business is an SME: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0651&from=EN>.
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Category 4:**Aid for research and development and innovation****R&D Projects (Art 25 of the GBER)**

Under Section 4 of the GBER, aid for R&D projects is exempt from prior notification to the Commission if it does not exceed the notification threshold, the general conditions are met and the aided part of the project comes completely within:

- fundamental research;
- industrial research;
- experimental development; or
- a feasibility study.

All eligible costs must be allocated to one of the above categories.

Eligible Costs

- Personnel costs (researchers, technicians and other supporting staff) to the extent employed on the project.

- The costs of instruments and equipment to the extent and for the period used for the project. Where they are not used in the project throughout their life, only the depreciation costs corresponding to the life of the project, as calculated on the basis of generally accepted accounting principles are eligible.
- The costs of buildings and land, to the extent and for the duration period used for the project. With regard to buildings, only the depreciation costs corresponding to the life of the project, as calculated on the basis of generally accepted accounting principles are eligible. For land, costs of commercial transfer or actually incurred capital costs are eligible.
- The costs of contractual research, knowledge and patents bought or licensed from outside sources at arm's length conditions, as well as costs of consultancy and equivalent services used exclusively for the project.

The eligible costs for feasibility studies are the costs of the study.

Notification Thresholds

predominantly fundamental research	where more than half of the eligible costs of the project are incurred through activities which fall within the category of fundamental research	€40 million per undertaking, per project*
predominantly industrial research	where more than half of the eligible costs of the project are incurred through activities which fall within the category of industrial research or within the categories of industrial research and fundamental research taken together	€20 million per undertaking, per project*
predominantly experimental development	where more than half of the eligible costs of the project are incurred through activities which fall within the category of experimental development	€15 million per undertaking, per project*
feasibility studies		€7.5 million per study

*If the project is a Eureka project or is implemented by a Joint Undertaking established on the basis of Article 185 or of Article 187 of the Treaty, the thresholds for fundamental research, industrial research and experimental development are doubled.

If the aid is granted in the form of repayable advances which, in the absence of an accepted methodology to calculate their gross grant equivalent, are expressed as a

percentage of the eligible costs and the measure provides that in case of a successful outcome of the project, as defined on the basis of a reasonable and prudent hypothesis, the advances will be repaid with an interest rate at least equal to the discount rate applicable at the time of grant, the thresholds (except for feasibility studies, but including the increased thresholds for Eureka or Joint Undertaking) projects are increased by 50%.

Maximum Amounts

predominantly fundamental research	predominantly industrial research	predominantly experimental development	Feasibility Study
€40 million per undertaking per project	€20 million per undertaking per project	€15 million per undertaking per project	€7.5 million per study per project

Aid Intensity

	Small enterprise	Medium enterprise	Large enterprise
Fundamental research	100%	100%	100%
Industrial research	70%	60%	50%
Experimental development	45%	35%	25%
Feasibility studies	70%	60%	50%

The aid intensities for industrial research and experimental development may be increased by 15 percentage points up to a maximum of 80% of the eligible costs if one of the following conditions is fulfilled:

- i) the project involves effective collaboration:
 - between undertakings among which at least one is an SME, or is carried out in at least two Member States, or in a Member State and in a Contracting Party of the EEA Agreement, and no single undertaking bears more than 70% of the eligible costs; or
 - between an undertaking and one or more research and knowledge-dissemination organisations, where the latter bear at least 10% of the eligible costs and have the right to publish their own research results;
- ii) the results of the project are widely disseminated through conferences, publication, open access repositories, or free or open source software.

The aid intensity for each beneficiary (e.g. the collaborators in a research project) must be established.

The contribution of a university to a project may be State Aid. Therefore the combined aid (from all public sources) and the university's/universities' contributions may not exceed the applicable aid intensity for each beneficiary.

Investment aid for research infrastructures (Art 26 of the GBER)

Aid for the construction or upgrade of research infrastructures in the form of investment costs in intangible and tangible assets is exempt from prior notification to the Commission if the general conditions above are met and:

- where a research infrastructure pursues both economic and non-economic activities, the financing, costs and revenues of each type of activity are accounted for separately on the basis of consistently applied and objectively justifiable cost accounting principles;

- the price charged for the operation or use of the infrastructure corresponds to a market price; and
- access to the infrastructure is open to several users and is granted on a transparent and non-discriminatory basis. However, an undertaking which has financed at least 10% of the investment costs of the infrastructure may be granted preferential access under more favourable conditions, but that access must be proportional to the undertaking's contribution to the investment costs and those conditions must be available to the public.

The aid intensity must not be more than 50% of the eligible costs which will be used for economic activities.

That does not affect the funding of non-economic research infrastructures - if a building is intended to be used 50% of the time for teaching and core university non-economic activities and is expected to be rented out 50% of the time for contract research or use by businesses, a total of 75% of the costs may be funded, i.e. an amount equal to all of the non-economic portion and 50% of the economic portion.

The notification threshold is €20 million per infrastructure.

Aid for innovation clusters (Art 27 of the GBER)

Aid for the construction or upgrade of innovation clusters in the form of investment costs in intangible and tangible assets is exempt from prior notification to the Commission if the general conditions are met and:

- the aid is granted exclusively to the legal entity operating the cluster;
- access to the cluster's premises, facilities and activities is open to several users and is granted on a transparent and non-discriminatory basis. However, an undertaking which has financed at least 10% of the investment costs of the cluster may be granted preferential access under more favourable conditions, but that access must be proportional to the undertaking's contribution to the investment costs and those conditions must be available to the public; and
- the fees charged for using the cluster's facilities and for participating in the cluster's activities must correspond to the market price or reflect their costs;

The aid intensity must not be more than 50% of the eligible costs, but it may be increased in assisted areas.

Operating aid in the form of personnel and administrative costs (including overhead costs) relating to:

- the animation of the cluster to facilitate collaboration, information sharing and the provision or channelling of specialised and customised business support services;
- the marketing of the cluster to increase participation of new undertakings or organisations and to increase visibility;
- the management of the cluster's facilities; organisation of training programmes, workshops and conferences to support knowledge sharing and networking and transnational cooperation may be granted for not more than 10 years.

The aid intensity must not be more than 50% of the eligible costs during the period in which the aid is granted. See above for how that is to be calculated where there are both economic and non-economic activities.

The notification threshold is €7.5 million per cluster.

Innovation aid for SMEs (Art 28 of the GBER)

The costs of:

- obtaining, validating and defending patents and other intangible assets;
- seconding highly qualified personnel from a research and knowledge-dissemination organisation or a large enterprise, working on research, development and innovation activities in a newly created function within the beneficiary and not replacing other personnel; or
- of innovation advisory and support services, are exempt from prior notification to the Commission if the aid intensity does not exceed 50% of the eligible costs.

In the case of aid for innovation advisory and support services the aid intensity can be increased up to 100% of the eligible costs provided the total amount of aid for those services does not exceed €200,000 per undertaking in any three year period.

The notification threshold is €5 million per undertaking, per project.

Aid for process and organisational innovation (Art 29 of the GBER)

Aid for process and organisational innovation in the form of:

- personnel costs;
- costs of instruments, equipment, buildings and land to the extent and for the period used for the project;
- costs of contractual research, knowledge and patents bought or licensed from outside sources at arm's length conditions;
- additional overheads and other operating costs, including costs of materials, supplies and similar products, incurred directly as a result of the project is exempt from prior notification to the Commission if the general conditions above are met.

But aid to large undertakings is permitted only if they effectively collaborate with SMEs in the aided activity and the collaborating SMEs incur at least 30 % of the total eligible costs.

The aid intensity must not be more than 15% of the eligible costs for large undertakings and 50% of the eligible costs for SMEs.

The notification threshold is €7.5 million per undertaking, per project.

Aid for research and development in the fishery and aquaculture sector (Art 30 of the GBER)

Aid for research and development in the fishery and aquaculture sector is exempt from prior notification to the Commission if the general conditions above are met and:

- the aided project is of interest to all undertakings in the particular sector or sub-sector concerned; and
- before the start of the project the following information is published on the internet:
 - a) that the project will be carried out; and
 - b) the goals of the project.

Category 5: Training aid (Article 31 of the GBER)

Training aid in the form of:

- trainers' personnel costs, for the hours during which the trainers participate in the training;
- trainers' and trainees' operating costs directly relating to the training project such as travel expenses, materials and supplies directly related to the project, depreciation of tools and equipment, to the extent that they are used exclusively for the training project;
- the costs of advisory services linked to the training project; and
- trainees' personnel costs and general indirect costs (administrative costs, rent, overheads) for the hours during which the trainees participate in the training.

is exempt from prior notification to the Commission if the general conditions above are met and aid is not granted for training which undertakings carry out to comply with national mandatory standards on training.

Accommodation costs are not eligible unless they are the minimum necessary accommodation costs for trainees who are workers with disabilities;

The aid intensity must not exceed 50% of the eligible costs, but may be increased up to 70% of the eligible costs:

- by 10 percentage points if the training is given to workers with disabilities or disadvantaged workers; or
- by 10 percentage points if the aid is granted to medium-sized enterprises; and
- by 20 percentage points if the aid is granted to small enterprises.

If the aid is granted in the maritime transport sector, the aid intensity may be increased to 100 % of the eligible costs provided:

- the trainees are not active members of the crew but are supernumerary on board; and
- the training is carried out on board of ships entered in Union registers.

The notification threshold is €2 million per training project.

APPENDIX 2 - THE R&D&I FRAMEWORK - AID FOR RESEARCH AND DEVELOPMENT AND INNOVATION – ELIGIBLE COSTS AND AID INTENSITIES

Eligible Costs - Annex I of the R&D&I Framework

Aid for R&D projects

- a. Personnel costs: researchers, technicians and other supporting staff to the extent employed on the project.
- b. Costs of instruments and equipment to the extent and for the period used for the project. If such instruments and equipment are not used for their full life for the project, only the depreciation costs corresponding to the life of the project, as calculated on the basis of good accounting practice, are considered as eligible.
- c. Costs of buildings and land, to the extent and for the period used for the project. With regard to buildings, only the depreciation costs corresponding to the life of the project, as calculated on the basis of good accounting practice are considered as eligible. For land, costs of commercial transfer or actually incurred capital costs are eligible.
- d. Cost of contractual research, knowledge and patents bought or licensed from outside sources at arm's length conditions, as well as costs of consultancy and equivalent services used exclusively for the project.
- e. Additional overheads incurred directly as a result of the project.
- f. Other operating expenses, including costs of materials, supplies and similar products incurred directly as a result of the project.

Aid for feasibility studies

Costs of study.

Innovation aid for SMEs

- a. Costs for obtaining, validating and defending patents and other intangible assets.
 - b. Costs for secondment of highly qualified personnel from a research and knowledge dissemination organisation or a large enterprise, working on R&D&I activities in a newly created function within the beneficiary and not replacing other personnel.
 - c. Costs for innovation advisory and support services.
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Aid Intensity – Annex II of the R&D&I Framework

	Small enterprise	Medium-sized enterprise	Large enterprise
Fundamental research	100%	100%	100%
Industrial research	70%	60%	50%
– subject to effective collaboration between undertakings (for large enterprises cross-border or with at least one SME) or between an undertaking and a research organisation; or – subject to wide dissemination of results	80%	75%	65%
Experimental development	45%	35%	25%
– subject to effective collaboration between undertakings (for large enterprises cross-border or with at least one SME) or between an undertaking and a research organisation; or – subject to wide dissemination of results	60%	50%	40%
Aid for feasibility studies	70%	60%	50%
Innovation aid for SMEs	50%	50%	N/A

If the aid is strictly limited to the minimum necessary, the Commission may allow higher maximum aid intensities than those laid down in Annex II, up to the following levels:

	Small enterprise	Medium-sized enterprise	Large enterprise
Fundamental research	100%	100%	100%
Applied research (industrial research or experimental development)	80%	70%	60%
– subject to effective collaboration between undertakings (for large enterprises cross-border or with at least one SME) or between an undertaking and a research organisation; or – subject to wide dissemination of results	90%	80%	70%

APPENDIX 3 - OTHER SOURCES OF ONLINE GUIDANCE

General State Aid guidance from the UK Government:

<https://www.gov.uk/state-aid> (Updated July 2015)

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/443686/BIS-15-417-state-aid-the-basics-guide.pdf

A compilation of State Aid rules in force:

http://ec.europa.eu/competition/state_aid/legislation/compilation/index_en.html

The State Aid Register:

All State aid cases which have been decided by the Commission since 1 January 2000, including block exemption cases:

http://ec.europa.eu/competition/state_aid/register/

State aid handbooks published by the Commission:

http://ec.europa.eu/competition/state_aid/studies_reports/studies_reports.html#vademecum

GBER FAQs:

http://ec.europa.eu/competition/state_aid/legislation/practical_guide_gber_en.pdf

A selection of summaries of UK court judgments on State Aid law (as at 2009):

http://ec.europa.eu/competition/court/state_aid/united_kingdom.pdf

Judgments of the European Court of Justice and the Court of First Instance on the application of the State Aid rules:

<http://ec.europa.eu/competition/court/index.html>

JISC/JANET have published case studies concerning the use of JANET at:

<https://community.ja.net/library/janet-services-documentation/example-use-cases>.

APPENDIX 4 - CONTACT POINTS FOR GUIDANCE IN UK GOVERNMENT DEPARTMENTS AND THE DEVOLVED ADMINISTRATIONS

For general advice on State Aid, contact the BIS State Aid team:

<https://www.gov.uk/guidance/state-aid#state-aid-contacts>;
sapu@bis.gsi.gov.uk

For specific advice on State Aid in the transport sector, contact the DfT State Aid team:

Stateaid-Transport@dft.gsi.gov.uk

For specific advice on State Aid in the agriculture, fisheries and aquaculture sectors, contact the DEFRA State Aid team: <https://gov.uk/state-aid-for-agriculture-and-fisheries#contact-your-local-state-aid-expert>

Devolved Administrations

Northern Ireland State Aid team:

<https://www.detini.gov.uk/contacts/european-support>;
stateaid@detini.gov.uk

Scotland State Aid team:

<http://www.scotland.gov.uk/Topics/Government/State-Aid/SAU/contacts>

Wales State Aid team:

<http://gov.wales/funding/state-aid/?lang=en>

APPENDIX 5 - COMPLAINTS AND THE UK COURTS

Complaints

A complaint of alleged unlawful State Aid may be made to the Commission by submitting (by post, email or online) the form published at:

http://ec.europa.eu/competition/forms/intro_en.html.

The use of this form is mandatory.

The Commission may send a copy of the complaint to Member States for comment. Therefore a non-confidential version of the complaint should be submitted to the Commission for that purpose.

People making a complaint to the Commission must demonstrate that they are interested parties. An interested party is defined widely: it means any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.

The Commission will acknowledge receipt of the complaint within 15 working days. The Commission can decide what priority to give to complaints, depending on issues such as the size of the beneficiary, the sector, and whether there have been other complaints about the same aid. The Commission will inform the complainant of the priority given to the complaint within 2 months.

The Commission will use its best endeavours to investigate a complaint within 12 months, but that is merely indicative and is not a binding commitment. Within that 12 month period, the Commission will try to make a decision on what it regards as a priority case or, on a non-priority case, the Commission will try to send an initial administrative letter to the complainant setting out its views.

That letter is merely a preliminary view, based on the information available and subject to any additional comments the complainant may wish to make within the next month. If the complainant does not provide further comments within that month, the Commission will treat the complaint as withdrawn.

If the Commission regards the complaint as unsubstantiated, it will inform the complainant within 2 months that there are insufficient grounds for taking a view on the case. The complaint will then be deemed to be withdrawn if further substantive comments are not provided within 1 month.

Where the aid is unlawful, the Commission will alert the complainant to the possibility of bringing an action in the UK courts.

The UK Courts

The Commission has published a Notice on the enforcement of State Aid law by national courts at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:085:0001:0022:EN:PDF>.

Anyone who is affected by unlawful State Aid can bring an action in the UK courts, and over the last few years the Commission has encouraged the use of national courts in State Aid cases with the result that there has been an increase in the number of State Aid cases being brought in the UK courts.

The UK courts have the power to order that:

- aid which has been granted, be repaid (with interest) by the beneficiary (even though the Commission has not reached a final conclusion as to whether or not there is unlawful State Aid);
- the person awarding the aid does not award it or continue to award it (an injunction); and
- financial compensation (damages) be paid to a competitor who has suffered loss as a result of the unlawful State Aid.

Although, if there are exceptional circumstances (where there are no doubts about there being State Aid which results in substantial and irreparable damage to a competitor), the Commission may make a provisional order for the recovery of the aid pending a final decision, the Commission cannot usually order the recovery of State Aid merely because the aid was not notified – it must carry out a full assessment and decide whether the aid is compatible with the common market.

The UK courts, on the other hand, are able to order the recovery of State Aid (with interest) simply because the aid has not been notified to the Commission.

The UK courts do not have the power to decide that aid which has been granted is compatible with the internal market.

Action in the UK courts may also be taken in to enforce recovery decisions: a beneficiary may apply to the court to review the legality of request for repayment made by the UK government; the UK government may take action against a beneficiary in order to implement a decision of the Commission that the aid must be repaid; or a third party may bring an action against the government for failure to implement such a decision.

A selection of summaries of UK court judgments on State Aid law (as at 2009) can be found at:

http://ec.europa.eu/competition/court/state_aid/united_kingdom.pdf.

APPENDIX 6 – GLOSSARY

Advantage

An economic benefit which the undertaking would not have received in the normal course of business, e.g. it is conferred for free or on terms which are better than normal commercial terms.

Ad hoc aid

Individual aid not granted on the basis of an aid scheme.

Aid

Any measure fulfilling all the criteria laid down in Article 107(1) of the Treaty.

Aid means the same as State Aid.

Aid scheme

Any act on the basis of which, without further implementing measures being required, individual aid awards may be granted to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be granted to one or several undertakings for an indefinite period of time and/or for an indefinite amount.

Aid intensity

The gross amount of aid, expressed as a percentage of the eligible costs before any deduction of tax or other charge.

It is used to determine the maximum amount of aid which may be granted under the State Aid rules.

In assessing the aid intensity, the figures should be before deduction of taxes and other charges.

Aid payable in instalments must be discounted to its value at the time the aid is granted using the Commission's reference rates. These can be found at: http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html.

Alternative trading platform

A multilateral trading facility as defined in Article 4(1)(15) of Directive 2004/39/EC where the majority of the financial instruments admitted to trading are issued by SMEs.

Arm's length

That the conditions of the transaction between the contracting parties do not differ from those which would be stipulated between independent enterprises and contain no element of collusion. Any transaction that results from an open, transparent and non-discriminatory procedure is considered as meeting the arm's length principle.

Article 107(1)

Article 107(1) of the Treaty or TFEU:

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 shall, in so far as it affects trade between Member States, be incompatible with the common market.

Assisted area

Areas of the EU which are economically underdeveloped and which are designated in an approved regional aid map under Article 107(3)(a) and Article 107(3)(c) of the Treaty.

Assisted areas are shown on the UK Assisted Areas Map:

<http://www.ukassistedareasmay.com/ieindex.html>.

Beneficiary

An undertaking which receives State Aid (either directly or indirectly), sometimes referred to as the recipient.

Collaborative Research

This is research which involves effective collaboration, i.e. where at least two independent parties undertake a project where they pursue a common objective based on the division of labour and jointly define its scope, participate in its design, contribute to its implementation and share its financial, technological, scientific and other risks, as well as its results, there will be 'effective collaboration'. One or several parties may bear the full costs of the project and so relieve other parties of its financial risks. Contract research and the provision of research services are not forms of collaboration.

Commission

The European Commission – the executive body of the European Union. It drafts new laws and ensures that Member States implement them and comply with the State Aid rules. It determines whether or not State Aid is compatible with the internal market and is therefore permissible.

Contract research

Where the undertaking typically specifies the terms and conditions of the contract, owns the results of the research and carries the risk of failure.

Cumulation

If an undertaking receives State Aid from more than one source or under different measures or categories of aid towards the same eligible costs, the total amount of State Aid must be cumulated (added together) and remain within the relevant aid intensity ceiling or threshold.

This rule applies to State Aid from any source, and to European Structural Funds.

de minimis aid

Under the *de minimis* Regulation State Aid which (when added to all other *de minimis* State aid received by recipient) does not exceed €200,000 (or €100,000 in the road transport sector) may be awarded over three fiscal years without having to notify the Commission before the aid is granted if, and only if, all the conditions set out in the Regulation are met.

de minimis Regulation

Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid. The full text is available at:

http://ec.europa.eu/competition/state_aid/legislation/de_minimis_regulation_en.pdf

Effective collaboration

This is where at least two independent parties undertake a project where they pursue a common objective based on the division of labour and jointly define its scope, participate in its design, contribute to its implementation and share its financial, technological, scientific and other risks, as well as its results. If all these conditions are met there will be 'effective collaboration'. One or several parties may bear the full costs of the project and so relieve other parties of its financial risks. Contract research and the provision of research services are not forms of collaboration.

Economic activity

An activity which involves offering goods or services on a given market and which could be carried out by a private operator in order to make a profit.

Eligible costs

The costs which may be funded as set out in the relevant State Aid rules.

Employment directly created by an investment project

Employment concerning the activity to which the investment relates, including employment created following an increase in the utilisation rate of the capacity created by the investment.

Environmental protection

Any action designed to remedy or prevent damage to physical surroundings or natural resources by the beneficiary's own actions, to reduce risk of such damage or to lead to a more efficient use of natural resources.

It includes energy-saving measures and the use of renewable resources.

Enterprise

Any entity engaged in an economic activity, irrespective of its legal form. This includes, in particular, self-employed persons and family businesses engaged in craft or other activities, and partnerships or associations regularly engaged in an economic activity.

Entrusted entity

The European Investment Bank and the European Investment Fund, an international financial institution in which a Member State is a shareholder, or a financial institution established in a Member State aiming at the achievement of public interest under the control of a public authority, a public law body, or a private law body with a public service mission: the entrusted entity can be selected or directly appointed in accordance with the provisions of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, or any subsequent legislation replacing that Directive in full or in part.

Equity Investment

The provision of capital to an undertaking, invested directly or indirectly in return for the ownership of a corresponding share of that undertaking.

European Structural Funds

Funds aimed at reducing disparities between the different levels of development of various regions of the EU and the backwardness of the least favoured regions of the EU under Article 174 of the TFEU.

Regulations on:

- the European Regional Development Fund (ERDF);
- the European Social Fund (ESF);
- the Cohesion Fund; and
- European Agricultural Fund for Rural Development (EAFRD)

can be found at:

http://ec.europa.eu/regional_policy/index.cfm/en/information/legislation/regulations/

Although the funding originates from the Commission, these funds are subject to the State Aid rules.

Experimental development

Acquiring, combining, shaping and using existing scientific, technological, business and other relevant knowledge and skills with the aim of developing new or improved products, processes or services.

This may also include, for example, activities aiming at the conceptual definition, planning and documentation of new products, processes or services; Experimental development may comprise prototyping, demonstrating, piloting, testing and validation of new or improved products, processes or services in environments representative of real life operating conditions where the primary objective is to make further technical improvements on products, processes or services that are not substantially set.

This may include the development of a commercially usable prototype or pilot which is necessarily the final commercial product and which is too expensive to produce for it to be used only for demonstration and validation purposes. Experimental development does not include routine or periodic changes made to existing products, production lines, manufacturing processes, services and other operations in progress, even if those changes may represent improvements.

Exit

The liquidation of holdings by a financial intermediary or investor, including trade sale, write-offs, repayment of shares/loans, sale to another financial intermediary or another investor, sale to a financial institution and sale by public offering, including an initial public offering (IPO).

Exit strategy

A strategy for the liquidation of holdings by a venture capital or private equity fund in accordance with a plan to achieve maximum return, including trade sale, write-offs, repayment of preference shares/loans, sale to another venture capitalist, sale to a financial institution and sale by public offering, including Initial Public Offerings.

Feasibility Study

The evaluation and analysis of the potential of a project, which aims at supporting the process of decision-making by objectively and rationally uncovering its strengths and weaknesses, opportunities and threats, as well as identifying the resources required to carry it through and ultimately its prospects for success.

Financial endowment

A repayable public investment made to a financial intermediary for the purposes of making investments under a risk finance measure, and where all the proceeds are returned to the public investor.

Financial intermediary

Any financial institution regardless of its form and ownership, including fund-of-funds, private equity investment funds, public investment funds, banks, micro-finance institutions and guarantee societies.

First commercial sale

The first sale by a company on a product or service market, excluding limited sales to test the market.

Follow-on investment

Additional risk finance investment in a company subsequent to one or more previous risk finance investment rounds.

Fundamental research

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.

GBER

Shorthand for the General Block Exemption Regulation.

General Block Exemption Regulation

Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

The full text is available at:

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0651&from=EN>.

The GBER permits State Aid if that aid falls within one of the categories in the GBER without the need to notify the Commission before the aid is granted if all the relevant conditions set out in the GBER are met.

Information about the aid must be sent to the Commission within 20 working days after a scheme made under the GBER and approved by the Commission comes into force or ad hoc aid is granted under the GBER.

General conditions

The general conditions set out in the GBER, namely:

- the aid must be transparent (and if the aid is not in the form of a cash grant, the gross grant equivalent must be calculated);
- there must be an incentive effect;
- only eligible costs are funded;
- only a specified percentage of the eligible costs (the aid intensity) is funded;
- aid over a certain amount must not be granted under the GBER; and
- the beneficiary must not be an undertaking in difficulty and there must be no active order against the beneficiary for the recovery of unlawful State Aid.

Gross grant equivalent

The amount of the aid if it had been provided in the form of a grant to the beneficiary before the deduction of any tax or other charge. See transparent aid.

Guarantee

A written commitment to assume responsibility for all or part of a third party's newly originated loan transactions such as debt or lease instruments, as well as quasi-equity instruments.

Guarantee rate

The percentage of loss coverage by a public investor of each and every transaction eligible under the relevant State Aid measure

Highly qualified personnel

Staff having a tertiary education degree and at least 5 years of relevant professional experience which may also include doctoral training.

Incentive effect

Aid has an incentive effect if it results in investment which would not have been made had the aid not been granted.

Independent private investor

A private investor who is not a shareholder of the eligible undertaking in which it invests, including business angels and financial institutions, irrespective of their ownership, to the extent that they bear the full risk in respect of their investment. On the creation of a new company, private investors, including the founders, are considered to be independent from that company.

Individual aid

Ad hoc aid and awards of aid to individual beneficiaries on the basis of an aid scheme.

Industrial research

The 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.

It comprises the creation of component parts of complex systems, and may include the construction of prototypes in a laboratory environment or in an environment with simulated interfaces to existing systems as well as of pilot lines, when necessary for the industrial research and notably for generic technology validation.

Industrial property rights

Patents, copyright, design rights, database rights, trade marks and similar rights which protect intangible assets.

Sometimes called intellectual property rights.

Innovation clusters

Structures or organised groups of independent parties (such as innovative start-ups, small, medium and large enterprises, as well as research and knowledge dissemination organisations, non-for-profit organisations and other related economic actors) designed to stimulate innovative activity through promotion, sharing of facilities and exchange of knowledge and expertise and by contributing effectively to knowledge transfer, networking, information dissemination and collaboration among the undertakings and other organisations in the cluster.

Innovative enterprise

An enterprise:

- that can demonstrate, by means of an evaluation carried out by an external expert that it will in the foreseeable future develop products, services or processes which are new or substantially improved compared to the state of the art in its industry, and which carry a risk of technological or industrial failure; or
- the research and development costs of which represent at least 10 % of its total operating costs in at least one of the three years preceding the granting of the aid or, in the case of a start-up enterprise without any financial history, in the audit of its current fiscal period, as certified by an external auditor.

Intangible assets

Assets which do not have a physical or financial embodiment such as patents, licences, know-how or other intellectual property.

Investment aid

This includes the following categories of aid:

Article 17 of the GBER - investment aid to SMEs regional investment and employment aid; and

Article 26 of the GBER concerning investment aid for research infrastructures.

Large undertaking/enterprise

An undertaking which is not an SME.

Loan

An agreement which obliges the lender to make available to the borrower an agreed amount of money for an agreed period of time and under which the borrower is obliged to repay the amount within the agreed period. It may take the

form of a loan, or another funding instrument, including a lease, which provides the lender with a predominant component of minimum yield. The refinancing of existing loans is not an eligible loan.

Medium sized enterprise

See SME.

Member State

A state which is a member of the European Union. The expression is also used to mean the governments of those countries.

The member states of the European Union are (at 1 February 2015) Austria, Belgium, Bulgaria, Croatia, the Republic of Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Slovakia, Spain, Sweden and the United Kingdom.

Natural person

A person other than a legal entity who is not an undertaking for the purposes of Article 107(1) of the Treaty.

Net increase in the number of employees

A net increase in the number of employees in the establishment concerned compared with the average over a given period in time. Any posts lost during that period must therefore be deducted and that the number of persons employed full-time, part-time and seasonal has to be considered with their annual labour unit fractions.

Notification

If State Aid cannot be granted under an aid scheme approved by the Commission, the GBER or the *de Minimis* Regulation, the proposed aid must be formally notified to the Commission using the Commission's IT system – State Aid Notifications Interactive (SANI) and approved by the Commission (or a decision made that it does not constitute State Aid or that the Commission will not raise any objection) before the aid may be granted.

Official Journal (OJ)

A Commission publication. It contains the text of all EC Directives and the State Aid rules, including notices, communications, frameworks and guidelines issued by the Commission.

Operating costs

Running costs, ongoing expenditure and working capital.

The State Aid rules usually prohibit aid for operating costs, on the grounds that an undertaking which needs aid to meet its operating costs is not competitive and should not be assisted.

There are exceptions:

- *de minimis* aid may be used to provide operating aid; and
- where an undertaking is in financial difficulties and is unlikely to survive in the short to medium term, limited aid may be provided in the short term to keep the undertaking afloat while a restructuring plan is formulated. But this must be in accordance with the State Aid rules. See undertakings in difficulty.

Organisational innovation

The implementation of a new organisational method in an undertaking's business practices, workplace organisation or external relations, excluding changes that are based on organisational methods already in use in the undertaking, changes in management strategy, mergers and acquisitions, ceasing to use a process, simple capital replacement or extension, changes resulting purely from changes in factor prices, customisation, localisation, regular, seasonal and other cyclical changes and trading of new or significantly improved products.

Personnel costs

The costs of researchers, technicians and other supporting staff to the extent they are employed on the relevant project or activity.

Predominantly

A project is considered to consist 'predominantly' of fundamental research or 'predominantly' of industrial research, if more than 50% of the eligible costs are incurred through activities which are fundamental research or, respectively, industrial research.

If the predominant character of the project cannot be established, the lower threshold imposed by the GBER applies.

Private equity

Private (as opposed to public) equity or quasi-equity investment in undertakings not listed on a stock-market, including venture capital.

Process innovation

The implementation of a new or significantly improved production or delivery method (including significant changes in techniques, equipment or software), excluding minor changes or improvements, increases in production or service capabilities through the addition of manufacturing or logistical systems which are very similar to those already in use, ceasing to use a process, simple capital replacement or extension, changes resulting purely from changes in factor prices, customisation, localisation, regular, seasonal and other cyclical changes and trading of new or significantly improved products.

Public service

A service which central, regional or local government provides.

Quasi-equity investment

A type of financing which ranks between equity and debt, having a higher risk than senior debt and a lower risk than common equity and whose return for the holder is predominantly based on the profits or losses of the underlying target undertaking and which are unsecured in the event of default. Quasi-equity investments can be structured as debt, unsecured and subordinated, including mezzanine debt, and in some cases convertible into equity, or as preferred equity.

Recipient

A person who receives State Aid; the same as a beneficiary.

R&D&I

Short hand for research and development and innovation.

Reference rates

The Commission publishes a method of calculating reference and discount rates applicable to commercial loans.

This takes account of the specific situation of the company or project. It is based on IBOR (the Interbank Offered Rate) with weightings based on the creditworthiness of the specific undertaking.

The reference rates can be found at:

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

More information can be found in the Communication from the Commission on the revision of the method for setting the reference and discount rates (2008/C 14/02) at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:014:0006:0009:EN:PDF>

Regional aid

Aid for investment granted to large companies or, in limited circumstances, operating aid which is targeted at specific areas or regions (assisted areas) to redress regional disparities.

Increased levels of investment aid granted to SMEs located in assisted areas over and above investment aid allowed in other areas is also regional aid.

Repayable advance

A loan for a project which is paid in one or more instalments and the conditions for the reimbursement of which depend on the outcome of the project.

Replacement capital

The purchase of existing shares in a company from an earlier investor or shareholder.

Research, Development and Innovation Framework

The European Commission rules that facilitate the granting of aid measures by Member States in support of research, development and innovation (R&D&I) activities. The Framework sets out the conditions under which Member States can grant state aid to companies to carry out R&D&I activities.

Research and knowledge-dissemination organisation

An entity (such as universities or research institutes, technology transfer agencies, innovation intermediaries, research-oriented physical or virtual collaborative entities), irrespective of its legal status (organised under public or private law) or way of financing, whose primary goal is to independently conduct fundamental research, industrial research or experimental development or to widely disseminate the results of such activities by way of teaching, publication or knowledge transfer.

Where such entity also pursues economic activities the financing, the costs and the revenues of those economic activities must be accounted for separately. Undertakings that can exert a decisive influence upon such an entity, in the quality of, for example, shareholders or members, may not enjoy preferential access to the results generated by it.

Research infrastructure

Facilities, resources and related services which are used by the scientific community to conduct research in their respective fields and covers scientific equipment or sets of instruments, knowledge-based resources such as collections, archives or structured scientific information, enabling information and communication technology-based infrastructures such as grid, computing, software and communication, or any other entity of a unique nature essential to conduct research.

Research infrastructures may be 'single-sited' or 'distributed' (an organised network of resources).

Risk finance investment

Equity and quasi-equity investments, loans including leases, guarantees, or a mix thereof to eligible undertakings for the purposes of making new investments.

SANI

Shorthand for State Aid Notification Interactive – the electronic system developed by the Commission for the notification of proposed State Aid measures. It may only be used by someone who has been allocated a SANI User account by BIS's State Aid branch.

Scheme

See Aid Scheme.

Secondment

The temporary employment of personnel by a beneficiary with the right for the staff to return to their previous employer.

Simplified Procedure

The simplified procedure for the notification and approval of more straightforward types of aid. In practice it is used to extend or slightly amend existing schemes.

Small Enterprise

An enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed €10 million.

SME

In brief, enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding €50 million, and/or an annual balance sheet total not exceeding €43 million.

See Annex I of the GBER for information on how to determine whether or not an enterprise is an SME: Annex 1 of the GBER sets out rules for determining whether or not a business is an SME.

Standstill obligation

The obligation imposed on Member States not to implement a new State Aid measure without first obtaining the Commission's approval.

This is enshrined in Article 108(3) of the TFEU.

State Aid

Assistance given by a public body or publicly-funded body to any organisation engaged in an economic activity, on a selective basis, and which distorts or has the potential to distort competition and affects trade between Member States.

State Aid rules

Short-hand for the regulations, notices, communications, frameworks and guidelines issued by the Commission. These allow the Member States (and public authorities in each Member State) to assist organisations in a way which avoids giving them an unfair advantage to the detriment of their competitors. You can find all the State Aid rules currently in force (and a link to older rules) at:

http://ec.europa.eu/competition/state_aid/legislation/compilation/index_en.html.

State Aid tests

The tests, encapsulated in Art 107(1), all of which must be satisfied for State Aid to exist.

Tangible assets

Assets consisting of land, buildings and plant, machinery and equipment.

Target undertaking

An undertaking in which an investor or investment fund is considering investing.

Technology transfer

Licensing or assigning industrial property rights or knowledge, creating spin-out companies and other forms of managing and disseminating knowledge.

The TFEU

The Treaty on the Functioning of the European Union. See the Treaty.

Transparent aid

Aid is transparent only if you can calculate precisely (in advance) the gross cash equivalent value of the aid without carrying out a risk assessment.

If the aid is not in the form of a cash grant, or if it is a cash grant paid in instalments, you must calculate the gross grant equivalent. When doing that you must use the reference rates fixed by the Commission and in force at the time of the grant. You will find these at: http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html.

Treaty

Originally the treaty which established the European Community, sometimes called the EC Treaty or the Treaty of Rome but, after amendment by the Lisbon Treaty, now known as the Treaty on the Functioning of the European Union (TFEU).

The crucial part of the TFEU, for State Aid purposes, is Article 107(1) which says:

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 shall, in so far as it affects trade between Member States, be incompatible with the common market.

Articles 107(2) and 107(3) set out exceptions to the general prohibition in Article 107(1) and are the basis on which the Commission is able to approve certain State Aid measures.

Undertaking

Any entity, regardless of its legal status, which is engaged in an economic activity and where there is a market in comparable goods or services.

An undertaking may be not-for-profit if it carries on an activity which, in fact or in theory, has commercial competitors.

It may be a private body, company, partnership, sole trader, agricultural co-operative, trade association, voluntary organisation, charity, university, research institution, social enterprise, not-for-profit organisation, or even a public body when it is engaged in an economic activity.

An entity may engage in economic activity in relation to some of its functions but not others.

Undertaking in difficulty

An undertaking in respect of which at least one of the following circumstances occurs:

- a. In the case of a limited liability company (other than an SME that has been in existence for less than three years or, for the purposes of eligibility for risk finance aid, an SME within 7 years from its first commercial sale that qualifies for risk finance investments following due diligence by the selected financial intermediary), where more than half of its subscribed share capital has disappeared as a result of accumulated losses. This is the case when deduction of accumulated losses from reserves (and all other elements generally considered as part of the own funds of the company) leads to a negative cumulative amount that exceeds half of the subscribed share capital. For the purposes of this provision, 'limited liability company' refers in particular to the types of company mentioned in Annex I of Directive 2013/34/EU (1) and 'share capital' includes, where relevant, any share premium.
- b. In the case of a company where at least some members have unlimited liability for the debt of the company (other than an SME that has been in existence for less than three years or, for the purposes of eligibility for risk finance aid, an SME within 7 years from its first commercial sale that qualifies for risk finance investments following due diligence by the selected financial intermediary), where more than half of its capital as shown in the company accounts has disappeared as a result of accumulated losses. For the purposes of this provision, 'a company where at least some members have unlimited liability for the debt of the company' refers in particular to the types of company mentioned in Annex II of Directive 2013/34/EU.
- c. Where the undertaking is subject to collective insolvency proceedings or fulfils the criteria under its domestic law for being placed in collective insolvency proceedings at the request of its creditors.

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- d. Where the undertaking has received rescue aid and has not yet reimbursed the loan or terminated the guarantee, or has received restructuring aid and is still subject to a restructuring plan.
 - e. In the case of an undertaking that is not an SME, where, for the past two years:
 - (1) the undertaking's book debt to equity ratio has been greater than 7.5 and
 - (2) the undertaking's EBITDA interest coverage ratio has been below 1.0.

Unlisted SME

An SME which is not listed on the official list of a stock exchange, except for alternative trading platforms.

Wage costs

The total amount actually payable by the beneficiary in respect of the employment concerned, comprising, over a defined period of time, the gross wage before tax and compulsory contributions such as social security, child care and parent care costs.

When aid is granted

Aid is considered granted at the moment the legal right to receive the aid is conferred on the beneficiary. This is usually when the award letter is sent or the funding agreement is entered into. It is not when the beneficiary receives the aid.

