



Department for  
Communities and  
Local Government

## Developing Projects Within State Aid Rules

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EUROPEAN UNION  
Investing in Your Future  
European Regional  
Development Fund 2007-13



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## What is a State Aid?

- Transfer of state resources by a state agency or *intermediary or the state administration of funds to an **undertaking***
- Gives **economic** advantage to an undertaking not otherwise available to others *even if a non profit organisation*





## What is a State Aid?

- Selectively effects the balance between firms and their competitors and potentially distorts competition (*all regional and sectoral aid schemes*)
- Potential effect on competition in a trade existing in member states (*anything which is not legally restricted to one area*). *There does not have to be any cross border trading actually involved in the project. The European Court has determined if it is an activity which another member state could do, this condition is met.*



## Undertaking

- Case 41/90 Hofner & Elner v Macroton
- “the concept of an undertaking, in the context of competition law, covers **any entity engaged in an economic activity, regardless of the legal status of the entity or the way it is funded**”
- The term includes limited companies, partnerships, trade associations, sole traders, self-employed professionals and State corporations.
- The ECJ held that a public placement office, which had exclusive right to act as an employment agency is an undertaking because employment procurement is to be regarded as an economic activity which is not necessarily carried out by public entities.



## Economic advantage to and Undertaking

- It is the activity not the legal status of the recipient!
- Any Entity (undertaking) which is engaged in economic activity which a private company could potentially do for profit
- Not national defence, national education, compulsory basic social security schemes
- Undertaking can be charity, not for profit organisation, even wholly owned subsidiaries of public bodies. In the Irish housing decision, Local Authorities engaged in house building for sale and rent were considered to be undertakings for state aid purposes.



## Types of Aid

- Grants and cash injections to public enterprises
- Loans and Loan Guarantees (even if never exercised)
- Tax Exemptions or deferrals
- Monopoly licences or guaranteed market share
- Consultancy Advice or free business advice i.e. from the local authority inward investment officer
- Enterprise Zones
- Free advertising on state owned/paid for TV (visit Britain campaign)
- and infrastructure projects benefiting identifiable end users



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## Market Economy Investor Principle Possible non aid if:

- Private Sector and public sector are investing on the basis of same risk and same benefit.
- Must be a true economic return
- Difficult to prove commercial investment if no private involved
- Private Sector not able to transfer risk to public sector



## State Aid at Many Levels

- State Aid must be examined at all possible levels, not just the end beneficiaries but:
- Non competitively procured Contractors
- Delivery Organisations and Intermediaries if they take a fee for their activity
- Private Sector Co-funders if they obtain a commercial advantage beyond pari passu investment terms i.e. obtain a secured return verse the public sector's unsecured return, or for example a software company which funds training and provides equipment which can only be used by SMEs if they buy from it from that company





## State Aid Challenge by EU

- By complaint, there is an easy to use complaint registration form on the Commission website. Any complaints registered must be investigated by the EU.
- It does not have to be the injured party who complains. Third parties i.e. resident's associations who object to a development, friend's of the earth etc.. And the Commission must investigate.
- During an investigation there is a standstill notice and no public money can go into the project until the Commission has completed their investigation.
- If declared illegal, clawback is mandatory with interest from the date of award of the state aid. Failure to clawback leads to fines on the grant giver for every day the illegal aid is not recovered.
- It is a legal duty of public bodies to notify state aid



## What has changed?

- The Land Remediation and Heritage Schemes Continue
- We now have the 5 English State Aid Schemes
  - The English Property Scheme allows Grants or Loans
  - English Property Scheme does not cover environmental measures
  - The English Risk Capital allows equity
  - All the rest are only Grants
- Loan Funds can be provided without state aid provided that loans are lent at a fully commercial interest rate measured according to the European Communication on loan interest (i.e. Libor plus between 4 to 10 percentage points dependent on risk) and that Commercial co-financers i.e. banks do not obtain a subordinated position i.e. the fund does not take a disproportionate level of defaults.



## The Affect of Leipzig Halle

- The Commission examines all infrastructures constructed by the public sector which are later used for economic uses, whether or not by the public sector
- The original case for the project was market failure on the basis of it never being profitable for the private sector.
- The Court held that a project did not have to be profitable to be an economic activity.
- You have to consider not the current market but the possibility of the future.
- DG Regio introduced a grid for declaring projects where it required all projects in these category to be notified to the Commission for compliance

Affects projects operated by the public sector where the activity is partially commercial but it is done for a public interest reason



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## Possible Solutions

- Separate the owner from the operator i.e. Brighton West Pier
- German Incubator Case.
- Combination of Land and Property, Heritage, Regional Aid to cover the project.
- If all else fails notification, but is likely to take a long time



## De Minimis

- From 1<sup>st</sup> Jan 2007
- Limits €200,000 over a 3 year period
- Recipients must declare all aid, not just de minimis aid
- Not allowed to top up or cumulate with other notified aid
- €100,000 maximum for transport sector (road haulage, taxis etc..)
- From June Fisheries can have aid up to €30,000 (not for increasing fleets).
- €7,000 for agriculture
- Can be used for anything except export, steel, coal and ship building and cannot be used for tax measures



## Aid Administrator

- Must check what other aid the organisation has had over the previous 3 years
- Test the group collectively
- Record the answers in a database
- Check that the aid they want to give plus what went before does not exceed €200,000 for non agriculture €7,000 for agriculture
- Provide them letter stating that they have received aid of €x and they must show this to any other public body they are seeking aid from for 3 years
- Be able to answer any Commission question within 20 working days.



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## New Developments

- All State Aid Frameworks and Notifications expire 31<sup>st</sup> December 2013
- Have to be replaced with new schemes
- New guidelines look generally favourable
- Support to large companies is heavily restricted



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Questions?