

State aid - General Guidance in relation to the delivery of Structural Funds in Wales 2007-2013

Introduction

State aid is an EC term for any public resource given selectively to undertakings engaged in economic activity that could potentially affect competition and trade between Member States. Preferential public assistance - State aid - can distort the market, which in turn can result in lower competitiveness for business, less innovation and ultimately higher prices for consumers. The overall aim of the State aid rules is therefore to maintain a level playing field for free and fair competition in the single market. State aid control is therefore an essential part of competition policy to ensure effective competition and free trade.

The State aid rules also provide a clear framework and discipline to assist public authorities to ensure that scarce resources are appropriately targeted in an effective and efficient manner. The state aid rules help to ensure that best value is obtained for public funds, making sure that these resources are used where they can have most impact, targeting aid where it is most required.

Aid administrators have a duty to ensure any public assistance provided to organisations engaged in commercial economic activities complies with the State aid rules. This does not mean that State aid cannot be awarded, just that it must be awarded in line with the rules.

There is wide scope to provide support to projects in line with the provision of the State aid rules. Over the last few years the Commission has significantly modernised the State aid rules and a range of instruments and tools are available to target public support on sustainable investment to contribute towards the Lisbon Strategy for growth, jobs and competitiveness.

This guidance note sets out further information on the application of these rules, identifying where and when State aid can be applied

Structural funds context

Council regulations¹ require that operations financed by the Structural Funds must comply with the rules on competition, including rules on State aid. There is therefore a requirement for operation of the funds to take account of the specific legislation in relation to State aid. Article 54 of Council Regulations (EC) No 1083/2006 specifically states the following, in relation to the level of contribution from the Funds:

¹ Council Regulation (EC) No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund states that “the activities of the Funds and the operations which they help to finance should be consistent with the other Community policies and comply with Community legislation”. Article 9(5) also states that “operations financed by the Funds shall comply with the provisions of the Treaty and of acts adopted under it.”

“For State aid to enterprises within the meaning of Article 87 of the Treaty, public aid granted under operational programmes shall observe the ceilings on State aid.”

Where the direct award of Structural Funds involves State Aid, the Managing Authority must ensure that the Structural Funds contribution as well as any other public funding awarded to a project complies with State Aid rules. Similarly, where Structural Funds will be awarded to part finance State aid schemes, such schemes should have the necessary European Commission approval in accordance with Articles 87 and 88 of the EC Treaty by ensuring that they comply fully with an existing approved scheme or a block exemption or by notifying the aid separately.

It is also important to note that where the award of funds is classed as State aid, the specific criteria identified within the State aid rules take priority over any generic eligibility criteria and maximum intervention rates identified within the operational programmes.

It should also be noted that a positive decision by the Commission on a major project notification does not constitute state aid approval. State aid cover for such projects should be sought in line with the attached guidance.

This guidance document provides further general guidance on the application of the general State aid rules. Specific rules that apply to Agriculture and Fisheries are not covered in this general guidance as there are extensive specific provisions relating to these areas. Sponsors putting forward potential projects relating to these sectors should seek further guidance from WEFO in the first instance.

What is State aid?

State aid is an EC term for any **public support** given selectively to an **undertaking** that could potentially affect competition and intra-community trade. State aid provided by European Union member states can distort the market, which in turn can result in lower competitiveness for business, less innovation and ultimately higher prices for consumers. There is therefore a need for effective State aid control in order to maintain a level playing field for free and fair competition in the single market.

Public support can take the form of direct payment of State resources in the form of grants and subsidies as well as indirect benefits that affect the public budget such as tax breaks, rate rebates, low interest loans, selling public land below market value and the provision of services for free or below market rates.

An **undertaking** is defined as any entity, regardless of its legal status, which is engaged in economic activity and where there is a market in comparable goods or services. It does not have to be profit making so long as the activity carried out is one which in principle has commercial competitors. It can therefore include voluntary and non-profit-making public or private bodies when they are engaged in economic activity. Charities, universities, research institutions, voluntary entities, social enterprises and public sector bodies may be deemed to be undertakings when they are engaged in economic activity.

Council Regulation (EC) No 1083/2006 on Structural Funds confirms that “in the context of aid schemes under Article 87 of the Treaty, beneficiaries are public or private firms carrying out an individual project and receiving public aid.”

Economic activity means an activity which consists in offering goods or services on a given market and which could, at least in principle, be carried out by a private actor in order to make profits.

State aid Definition and Identification of State aid

State aid is defined by Article 87.1 of the EC Treaty as follows

“Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatened to distort competition by favouring certain undertakings or certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.”

This definition translates to the five tests or criteria set out in box A below. All five tests have to be met for the funding to be classed as State aid and for the State aid rules to apply.

Box A: State aid criteria:

- measure granted by the state or through state resources
- it confers an advantage on the recipient
- it favours undertakings engaged in economic activity or the production of certain goods (i.e. it must be selective in its nature)
- it distorts or has the potential to distort competition, and
- it relates to an activity that is tradable between Members States and the aid has the potential to effect trade.

Any award meeting **all** five tests is deemed to be State aid and is thus caught by State aid regulations. The European Courts interpret the application of the tests widely. The potential to distort competition and affect trade criteria, in particular, are very broad and it is often difficult to argue that these tests are not met.

Interpreting the 5 tests

Aid granted by the state. This includes support provided either directly by the State (Central Government, devolved administrations, regional and local authorities) or by companies and agencies established by the State to distribute public support. State

resources include tax exemptions and also funds not permanently belonging to the state but under state control, e.g. lottery funding and structural funds money.

An **advantage is conferred** when a measure relieves the burdens normally assumed in an undertaking's budget, giving it an economic advantage which it would not normally have obtained under market conditions. An advantage is a benefit to an undertaking, granted for free or on favourable (i.e. non-commercial) terms.

A **selective measure** is one that targets particular businesses, locations, types of firm (e.g. small enterprises) or a specific sector is considered selective. A measure that provides support to all companies in Wales would also be deemed to be selective as Wales represents only a part of the UK Member State. A *general* measure affecting the whole of the Member State's economy e.g. a nation-wide fiscal measure, is not considered a State aid.

Competition is distorted if the aid in question strengthens the competitive position of the recipient by reducing its costs in relations to its competitors. The potential to distort competition does not have to be substantial or significant, and this criterion may apply to small amounts of aid and firms with little market share. The Commission interprets this very widely and it is for the member state to demonstrate that there is no distortion. In practice most interventions have the potential to distort competition.

Effect on trade. Most products and services are traded between member states and therefore aid for any selected business or economic activity is capable of affecting trade between states even if the recipient undertaking itself does not trade with other member states. Companies do not have to be involved in exporting goods themselves in order for there to be an effect on trade between member states. It is enough that the product or service is subject to trade between member states. The Commission's interpretation of this test is very broad. Consequently most activities are viewed as tradable.

A measure fulfilling **all of the five characteristics** above is deemed to be State aid and is, according to Article 87.1, "incompatible with the common market", and therefore in principle prohibited.

Compatible Aid

The State aid rules do however recognise that there are some instances where the market alone does not produce the optimal outcome and that Government intervention in such circumstances can be beneficial. For example provision by individual companies in relation to training its workforce or the undertaking of research and development is often less than optimal and incentives to raise the level of these activities are considered beneficial.

Similarly, as economic development can be uneven in terms of its regional spread, incentives to encourage investment in less economically-developed regions are allowed. The Commission recognises that the positive outcomes of allowing State aid in such circumstances outweigh the negative effects and so the State aid rules do allow for beneficial types of aid to be paid.

The circumstances where State aid may be deemed to be compatible by the Commission are set out in a series of frameworks, guidelines and block exemptions published by the EC (The State aid Rules). There is also scope to separately notify schemes or intended single aid payments to the Commission for individual approval on the basis that the aid provided is directly compatible with the Treaty.

The European Commission governs Member states' compliance with these rules and must be notified of all schemes or measures involving state aid. State aid granted without Commission approval is viewed as unlawful and may result in infraction proceedings and the recovery, with interest of the payment from the recipient.

The Welsh European Funding office, as Managing Authority must ensure that application of the European Structural Funds programme 2007-2013 is State aid compliant. Any application of the Funds that is likely to constitute State aid will require the necessary Commission approval **before** the aid is granted, either by ensuring that it complies fully with an existing approved scheme or a block exemption or by notifying the aid separately.

Cumulation of aid

If an undertaking is receiving aid from several sources in support of the same project costs, this support must be cumulated when calculating the level of State aid. When considering the level of aid awarded to a project, there is a need to cumulate aid received from **all public sources, including structural funds money**. Aid administrators need to ensure that the total amount of support received by a recipient in respect of a single project does not breach the relevant allowable aid intensity identified within the relevant cover.

The State Aid Rules

The main State aid rules and regulations that are currently in force are identified in the 3 tables below. Tables 1 and 2 identify the main horizontal² rules while table 3 identifies the sectoral rules that apply. These tables identify the overall objectives supported by the regulation providing an overall indication of the type of aid that can be awarded.

Table 1: Group or Block Exemptions and De minimis

Table 2: Guidelines and Frameworks

Table 3: Sectoral Rules

² The horizontal State aid rules regulate aid for objectives which apply across the economy and are aimed at solving problems that may arise in any industry and any country.

Table 1: Group / Block Exemptions - No notification required subject to compliance with regulation

Group or Block Exemptions	Overall Objective Supported by Regulation
<ul style="list-style-type: none"> • General Block Exemption Regulation 	Support for: <ul style="list-style-type: none"> • Capital investment and employment aid • Aid for newly created small enterprises • Aid for SMEs one off consultancy and participation in fairs/exhibitions • Environmental aid • Research and development • Innovation aid • Risk Capital • Training aid • Aid for disadvantaged and disabled workers
<ul style="list-style-type: none"> • Services of General Economic Interest Block Exemption 	Compensation awarded for services of general economic interest – public service obligations carried out for the benefit of the community at large
<ul style="list-style-type: none"> • De minimis Regulation 	Support for any activity for all companies, subject to a cumulative 3 year threshold.

General Block Exemption

The **General Block Exemption Regulation (GBER)** provides automatic approval for a range of measures allowing public authorities to directly grant aid without the need to notify the Commission provided that the support awarded complies with the requirements set out in the regulation.

The GBER cuts red tape and administrative burden by making it quicker and easier for aid administrators to grant certain types of aid without the need to involve the Commission.

As long as **all** the terms of the GBER are met, there is no requirement to notify the Commission before awarding aid – **such measure can be put directly into effect by Member States**. The aid or aid scheme must, however, be registered with the Commission within 20 days of its implementation and detailed records kept for 10 years. Aid awarded under such schemes must also be reported annually to the Commission.

The GBER includes common provisions that must be met (transparency, cumulation, incentive effect and scope) as well as specific criteria for each of the categories of aid covered by the Regulation. These include:

- the type of activity that can be supported;
- the maximum intensity rates (percentage of support that can be awarded);
- notification threshold – upper limit of individual aid that can be awarded before it has to be notified to the Commission; and
- eligible costs – the costs that can be supported under a specific measure

Any aid awarded under the cover of GBER will need to be registered with the Commission. If you are administering State aid schemes on behalf of WEFO, please see annex A for details of the registration process to ensure you have the appropriate cover in place.

De Minimis

De Minimis is a generic term for small amounts of public funding to a single recipient. De minimis funding is exempt from notification requirements because the European Commission considers that such a small amount of aid will have a negligible impact on trade and competition. The current de minimis threshold is set at €200,000 (€100,000 for undertakings active in the road transport sector) over a rolling three fiscal year period. The threshold applies cumulatively to all public assistance received from all sources and not to individual schemes or projects. While there is no requirement to notify or register de minimis funding with the Commission (as it is not actually state aid), there is a need to comply with the Regulation, with stringent administrative requirements to adhere to. In particular, the following apply:

Considerations for those administering de Minimis schemes on behalf of WEFO:

To comply with the de minimis regulation aid providers must have adequate systems in place to ensure:

- beneficiaries are informed of the de minimis nature of the aid;
- the de minimis threshold will not be breached;
- detailed records of aid provided under de minimis are kept for 10 years.

Considerations for direct beneficiaries of de minimis aid

Beneficiaries of de minimis support will be required to certify the level of other de minimis aid received before support can be awarded to ensure that the threshold is not breached..

Table 2: Guidelines and Frameworks – require direct notification to the Commission for approval before award of aid.

Guidelines/Frameworks	Overall Objective Supported by Regulation (subject to Notification and approval by Commission)
<ul style="list-style-type: none"> • Environmental Protection Guidelines 	Support for environmental protection and sustainable development, particularly to encourage SMEs to improve their environmental standards
<ul style="list-style-type: none"> • Regional Aid 2007-2013 Guidelines 	Support for productive investment or job creation linked to the investment in assisted areas Support for business start ups in assisted Areas
<ul style="list-style-type: none"> • Framework for Research & Development and Innovation 	Support for research, development and innovation activity
<ul style="list-style-type: none"> • Risk Capital Guidelines 	Support for Risk capital measures aimed at SMEs
<ul style="list-style-type: none"> • Framework for Service of General Economic Interest 	Public service compensation to undertakings entrusted with providing a service of general economic interest

Any aid scheme or individual award not covered under a block exemption or de minimis must be directly notified to the Commission for approval unless covered by an existing notification (i.e. already notified to the Commission). The Commission has issued a number of guidelines and frameworks identifying the types of aid that are likely to be deemed compatible, setting out the Commission's views on the meaning of aid for various purposes.

Compliance with the conditions identified within these guidelines does not automatically provide approval for an aid measure. The frameworks and guidelines merely serve to identify the types of measure that are likely to be approved by the Commission. **Aid which meets the criteria of guidelines or frameworks must still be notified to the Commission for approval before the aid is awarded, unless covered by an existing notification.** The full notification process can take on average from 6 to 12 months or more to process, depending on the complexity of the matter in question.

Further guidance and advice should be sought through WEFO when support for a project is likely to require notification.

When a new State aid scheme is being developed (or significant changes made to an existing scheme) it must be notified³ to and approved by the Commission before it is brought into effect – a State aid scheme brought into effect without notification and approval is illegal by virtue of non-notification and lack of approval alone. The Commission has sole competence in this matter i.e. only the Commission can decide whether aid is compatible with the Treaty.

Table 3: Sectoral Rules

In addition to these horizontal State aid rules there are also a number of sectoral State aid rules, with specific rules applicable to individual sectors as follows:

<p>Audiovisual</p> <p>Principles and Guidelines for the Audiovisual Sector in the Digital Age</p> <p>Legal aspects linked to cinematography and other broadcasting</p> <p>Mandate on cataloguing cinematographic works</p>
<p>Broadcasting</p> <p>Communication on State aid rules to public broadcasting services</p>
<p>Postal Services</p> <p>Notice by the Commission on application of the State aid rules to the postal sector</p>
<p>Sensitive Sectors:</p> <ul style="list-style-type: none"> • Coal • Shipbuilding • Steel • Synthetic fibres

Sponsors putting forward potential projects relating to these sectors should seek further guidance from WEFO in the first instance.

State aid and transport

In addition to the general State aid rules, the Treaty also contains specific provisions for State aid to transport by road, rail and inland waterways at Article 73 which states that aid shall be compatible with the Treaty if it:

- Meets the needs of coordinated transport; or
- Represents reimbursement for the discharge of certain obligations inherent in the concept of a public service.

³ Unless covered by an existing approved notification, a block exemption or the de minimis regulation.

The transport sector has specific state aid regulations as follows:

- Regulations 1191/69 and 1107/70 for transport by road, rail and waterways, covering aid relating to a Public Service Obligation (PSO)
- Commission Regulation 2408/92, Community Guidelines 199/C 350/07 for transport by air setting out conditions as to when PSOs can be imposed for scheduled air services to an airport serving peripheral or development region or on a thin route to any regional airport in its territory
- 2005/C 312/01 Guidelines on financing of airport infrastructure and operations and start up aid to airlines departing from regional airports;
- Regulation 3577/92, Communications 2003/595 and 2006/196 (relating to PSOs to, from and between islands) and Community Guidelines C2004/43 relating to the maritime sector;
- Guidelines 2008/C 184/07 relating to aid to Railway undertakings, these cover the public financing of infrastructure, the purchase and renewal of rolling stock, restructuring of railway undertakings and transport coordination.

Where proposed aid does not fall within the transport rules, it needs to be considered with reference to the general State aid rules identified in this guidance.

Further Information

The remaining sections of the guidance document provide further consideration of State aid matters as follows:

- Summary of State aid decision process
- State aid considerations as they relate to service providers and deliverers
- Practical guidance for sponsors administering aid schemes on behalf of WEFO under the General Block Exemption Regulation

Further information on State aid is also available as follows:

- [Welsh Assembly Government State aid website](#)
- [Department for Business, Enterprise and Regulatory Reform State aid website](#)
- [European Commission website](#)
- [- vademecum on State aid rules;](#)
- [- SME guide on State aid rules](#)

Summary of the State aid Decision Process

In assessing whether support for your project or scheme constitutes State aid and has the appropriate State aid cover you need to address the following questions:

Question 1: Does the funding provide support to undertakings involved in commercial activities?

Definition of support:

Support can take the form of direct payment of State resources in the form of grants and subsidies as well as indirect benefits that affect the public budget such as tax breaks, rate rebates, low interest loans, selling of public land below market value and the provision of services for free or below market rates.

Definition of an undertaking:

An undertaking is defined as any entity, regardless of its legal status, which is engaged in economic activity and where there is a market in comparable goods or services. It does not have to be profit making so long as the activity carried out is one which in principle has commercial competitors. It can include voluntary and non-profit-making public or private bodies when they are engaged in economic activity. Charities, universities, research institutions, voluntary entities, social enterprises and public sector bodies may be deemed to be undertakings when they are engaged in economic activity.

Economic activity means an activity which consists in offering goods or services on a given market and which could, at least in principle, be carried out by a private actor in order to make profits.

If Yes: Proceed to Question 2

If No: No further consideration of State aid required.

Question 2: Is the support classed as State aid?

There is State aid where **all** the following conditions are met:

- Support is granted by the state or through State resources;
- The measure confers an advantage on the recipient;
- The measure favours certain undertakings or the production of certain goods;
- It distorts or has the potential to distort competition; and
- It has a potential or actual effect on trade between EU Member States.

Note: The European Courts interpret the application of the tests widely. Further advice should be sought if you are unsure whether or not the conditions apply.

If Yes: Proceed to Question 3

If No: No further consideration of State aid Required

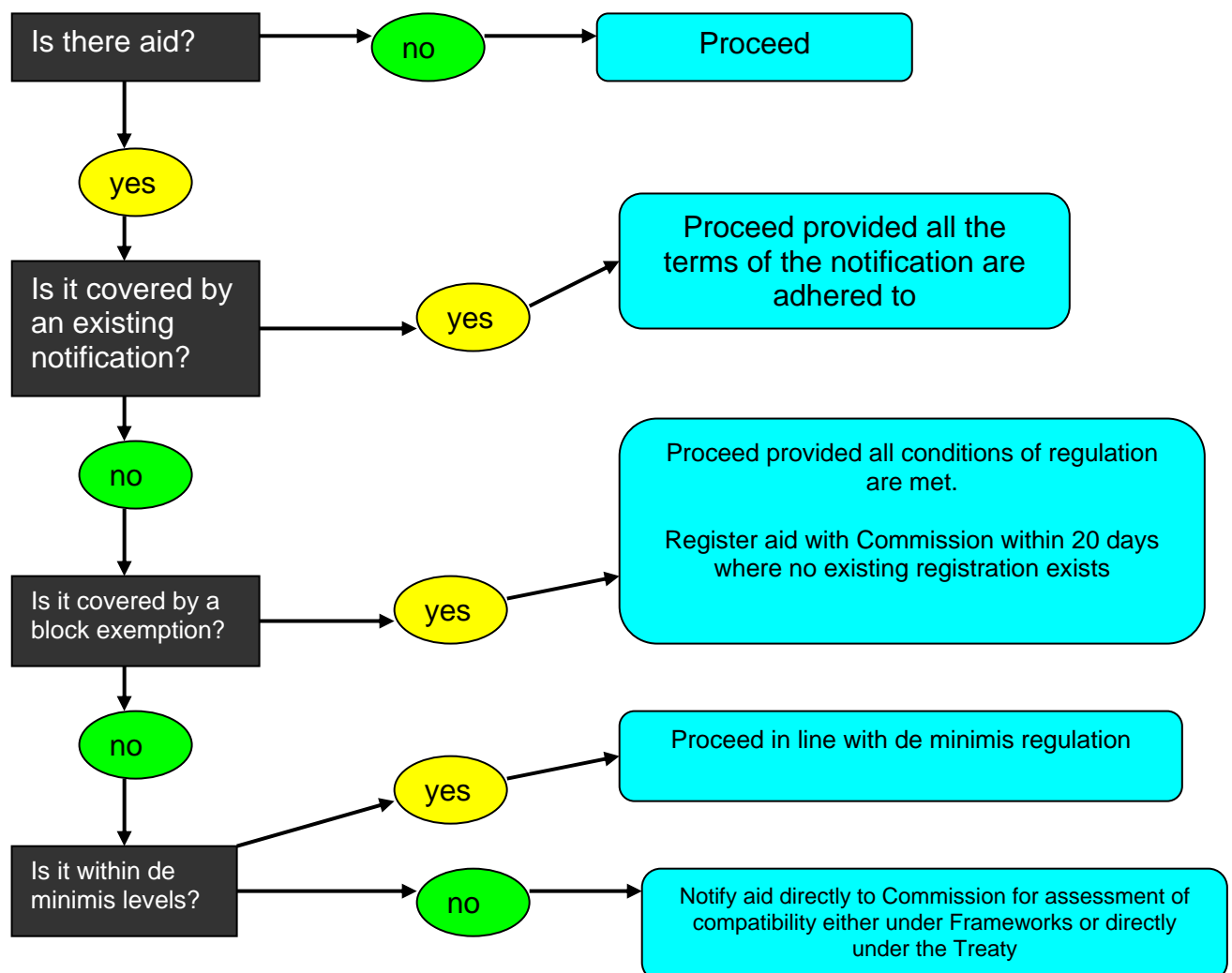
Question 3: What State aid cover is in place for the proposed funding?

Where support is deemed to be State aid, there is a need to ensure that the relevant State aid cover is in place, either:

- under an existing notified scheme; or
- under one of the block exemptions; or
- by direct notification of an aid scheme or individual aid (in line with the Guidelines and Frameworks, or directly under the Treaty); or
- aid is awarded in line with the de minimis regulation

The following decision tree provides further guidance on the process for ensuring that the appropriate State aid cover is in place

State Aid decision process



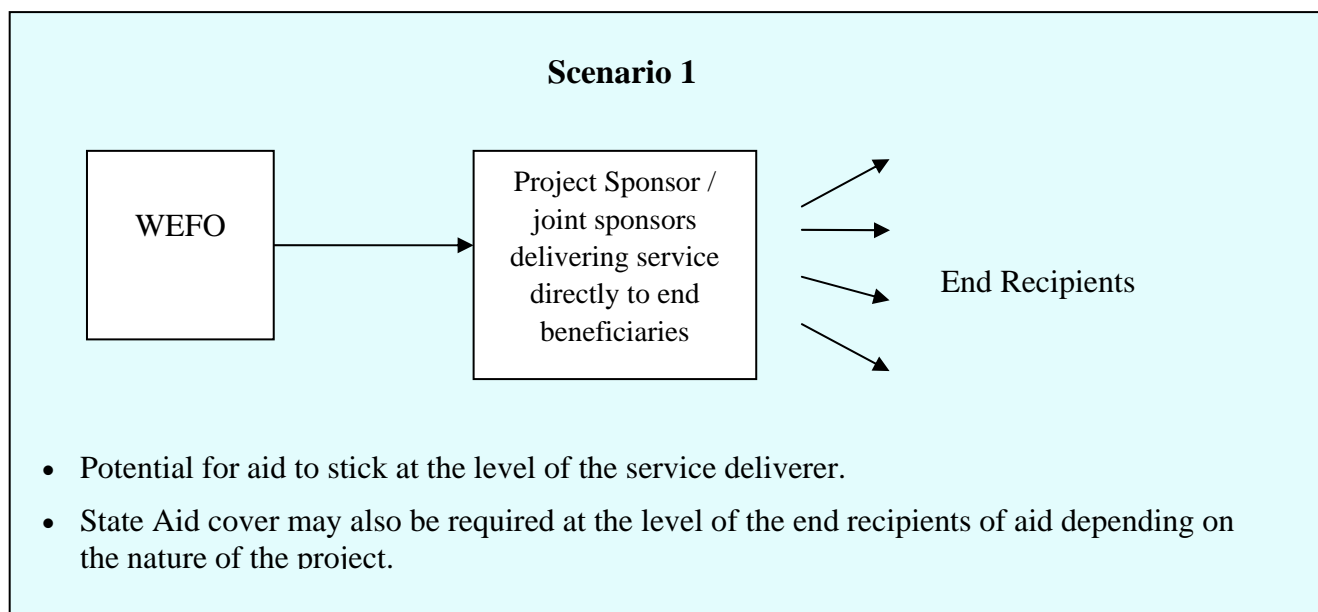
Any individual award of aid or aid scheme already notified to the Commission or registered under a block exemption will have a reference number allocated to it as follows:

Type of Decision	Reference
Existing approved scheme following State aid decision by Commission	Notified scheme reference number Nxxx/200x or NNxx/200x
General Block Exemption Regulation	Registered scheme reference number: Xxx/20xx

State Aid Implications as they relate to Service providers and deliverers.

Where funding is provided to a sponsor (or joint sponsors) and that sponsor undertakes the direct delivery of an economic activity for the benefit of end users, there is potential for State aid to be present at two levels:

- a) At the level of the end recipient of the service; and
- b) At the level of the service deliverer.

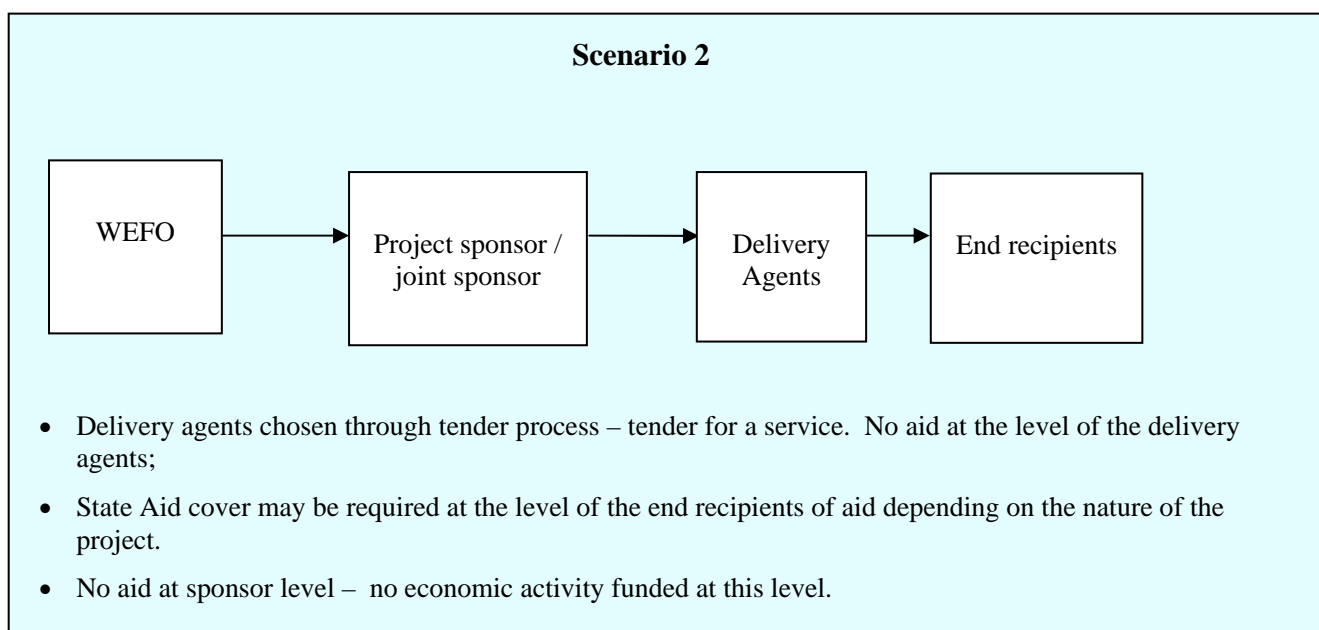


In the absence of an open procurement exercise to select the service provider, it is difficult to evidence that the market price is being paid for a service and that there is no overcompensation awarded to the service provider. The service deliverer might therefore be in receipt of an advantage over and above that available to other organisations delivering similar services, with funding awarded likely to be classed as State aid at the level of the service deliverer.

Any State aid awarded would require the necessary cover. However, as the funding is awarded in support of the general operating costs of the service provider, there is limited scope for cover. Operating aid is seen by the European Commission as being very distortive and is only allowed in exceptional circumstances. It may also prove difficult to quantify in practice the exact level of State aid involved.

Where there is more than one source for the acquisition of goods, services or outcomes, competitive procurement is seen as the most effective way of appraising the options available and achieving the best value for money. Competitive procurement removes the unfair advantage by offering the contract to the open market in a fair and transparent way.

There is therefore scope to eliminate State aid at the level of the deliverer by requiring that the delivery of economic activity within projects is subject to procurement. (Tender for a service).



Services of General Economic Interest (SGEIs)

In certain circumstances it may be possible to award compensation to an operator for the delivery of a Service of General Economic Interest with which it has been formally entrusted in line with a public service obligation.

SGEIs are identified as services which:

- The market does not provide or does not provide to the extent or quality that the State requires; AND
- Are in the general, not particular interest. i.e. beneficiaries should be the community at large.

It should be noted however, that where services are provided on a commercial basis, with a number of competitors, then they are unlikely to qualify as SGEIs, with no requirement for compensation to be awarded.

There may however be scope in limited circumstances to examine the possibility of applying identifying activity as an SGEI and awarding compensation in line with the relevant State aid cover.

It should however be noted that when a public authority decides to award the management of a service to a third party, it is bound to comply with the rules on public contracts and concessions.

Compensation awarded for the operation of SGEIs will be classed as State aid unless the strict criteria of Altmark are met (including the need to tender for the operator of the service). Compensation can be awarded to organisations entrusted with the operation of SGEIs under the SGEI block exemption or in line with Commission approvals under the SGEI framework.

Administration of SGEIs is however cumbersome with a requirement to entrust the service to a particular operator, calculate the level of compensation and monitor on an ongoing basis to ensure no overcompensation is awarded

**General Block Exemption Registration & Reporting Process –
practical guidance for sponsors administering aid schemes on
behalf of WEFO**

Where it is considered that a particular scheme or measure can be covered under one of the aid measures covered by the General Block Exemption Regulation there is a requirement to:

- Confirm compliance with all the detailed conditions identified within the regulations;
- Check to see whether the funding is already covered by an existing registration under GBER (A list of registrations currently in force is set out in the table below);
- If no existing registration exists, the support will need to be registered with the Commission as follows:
 - Submit a Summary Information sheet to the Welsh Assembly Government State aid Unit for onward transmission to the Commission within 20 days of implementing the aid to register the scheme/individual aid. This will need to include a web address where full details of the aid / aid scheme is published;
 - Following registration and publication of the summary information in the official journal, the Commission will issue a specific reference number for the particular scheme;
 - The funding offer letter provided to end beneficiaries should identify the relevant State aid approval identification number under which the support is provided to ensure transparency
- Monitor, record and report the level of aid awarded. In particular:
 - maintain sufficient records to ensure that the criteria and conditions of the approval are met
 - maintain records for a 10 year period;
 - Report annually on all aid paid out under the relevant GBER registration in relation to the particular measure or scheme.

Scheme Name	GBER Registration	Link to scheme documentation
Welsh Assembly Government Capital Investment aid and Employment aid Scheme	X115/2009	http://wales.gov.uk/docs/det/report/090126stateaidgberwagcapitalinvestmentaidandemploymentaidscheme.pdf?lang=en

Welsh Assembly Government Property Development Scheme	X190/2009	http://wales.gov.uk/docs/det/report/090130stateaidpropertydevelopmentscheme.pdf?lang=en
Welsh Assembly Government Support for Training Scheme	X1/2009	http://wales.gov.uk/docs/det/report/081217stateaidsupportfortrainingschemei.pdf?lang=en
Welsh Assembly Government Research, Development and Innovation Scheme	X329/2009	http://wales.gov.uk/topics/businessand economy/stateaid/schemes/090306rdischeme/?lang=en
Welsh Assembly Government SME Development Scheme	X21/2009	http://wales.gov.uk/docs/det/report/081222stateaidsmedevelopmentschemeen.pdf?lang=en
Welsh Local Government Capital Investment aid and Employment aid Scheme	X98/2009	http://www.wlga.gov.uk/uploads/publications/5047.pdf
Welsh Local Government Training Support Scheme	X97/2009	http://www.wlga.gov.uk/uploads/publications/5051.pdf
Welsh Local Government SME Development Scheme	X100/2009	http://www.wlga.gov.uk/uploads/publications/5049.pdf