

**Current issues in local government:
State aid**

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State aid: What? Why? How?



- **What?** A state aid is financial assistance (direct or indirect) provided by Government (inc. local government) to businesses that meets all the criteria in Art. 107(1) of the TFEU (ex 87);
- **Why?** Should you care that is ...
 - (1) State aid is concerned with the regulation and lawfulness of actions of public bodies, including local government;
 - (2) Potentially a very wide scope of application – as the BIS State aid Guide says there are some “*surprising examples*” of things regarded as State aid;
 - (3) Directly effective EU rules giving rise to obligations enforceable in UK Courts – draconian remedies;
 - (4) A low *de minimis* threshold for State aid;
- **How?** not need to know these highly complex rules inside out; but need to know how to spot a potential State aid issue.

Useful sources of information



- BIS: <https://www.gov.uk/state-aid>
 - The BIS State Aid Guide (June 2011):
<http://www.bis.gov.uk/assets/biscore/business-law/docs/s/11-1040-state-aid-guide.pdf>
- Commission: http://ec.europa.eu/competition/state_aid/overview/
- Textbooks:
 - *European Union Law of State Aid* (2ed, 2013) Bacon
 - *European State Aid Law and Policy* 2ed, 2009) Quigley
 - *EU State Aids* (4ed, 2012) Hancher, Ottervanger and Slot

Why is State aid controlled?



- Unique to EU
 - COMPETITION:
 - An aspect of competition law;
 - EU Commission website “*A company which receives government support gains an advantage over its competitors*”;
 - INTERNAL MARKET:
 - Ensures a “*level playing field*” in EU;
 - Avoids a “*subsidy race*”;
 - EFFICIENCY: of government intervention in the economy

State aid - structure

- Treaty Provisions:
 - Arts. 107 and 108 TFEU;
 - Also relevant Art 106(2) – undertakings providing services of general economic interest (“SGEI”);
- Secondary legislation: numerous Regulations;
- Commission adopted large amount of guidance;
- General Court and CJEU decisions: 100s of these;
- Commission decisional practice: on notifications and complaints: 1000s of these – not always coherent and consistent – and not bound by earlier decisions (!) ...
- State Aid Modernization 2012+

Structure (1)

- (1) What is “State aid”? Art. 107(1) - the key criteria.
- (2) Exemptions
 - Art. 107(2)
 - Art. 107 (3)
 - General Block Exemption Regulations (“GBER”)
 - Commission Guidance
 - *De Minimis* Aid Regulation
- (3) State aid procedures at EU level
- (4) State aid in the domestic courts

Structure (2)



- Some specific issues, relevant to local government:
 - Sale of land;
 - The grant of planning permission (inc. s. 106 and CIL);
 - CPO procedures;
 - Environmental protection;
 - Infrastructure;
 - Compensation for public services

What is a State aid ? The key criteria



- Art. 107 lays down several criteria:
 - (1) there must be an “*aid*” in the sense of an economic advantage;
 - (2) it must be granted directly or indirectly through state resources (including local government);
 - (3) it must confer an advantage on the recipient by favouring certain undertakings or the production of goods (“selectivity”);
 - (4) it must be liable to distort competition and affect trade between Member States.
- Looking at each (briefly) in turn:

Criterion (1) “Aid”; economic advantage



- Art. 107(1) “*any aid*”
- Examples:
 - State provision of goods or services on preferential terms;
 - Preferential loans;
 - Guarantees;
 - Indemnities;
 - Tax exemptions;
 - Waving sums due.
- Also:
 - Infrastructure provision (if constructed or managed by private undertakings or dedicated to the use of particular undertakings);
 - Some environmental schemes: e.g. Emissions trading schemes; Feed-in-tariffs etc.

Criterion (1) “Aid”; economic advantage cont.



- Private Investor (often referred to as the Market Economy Investor Principle, “MEIP”) and Private Creditor tests
- In short where the state acts on terms which would be acceptable to a commercial actor; no State aid under Art. 107(1)
- Could the advantage (e.g. a loan) have been received on such terms in the normal course of business?
- Can look at long term profitability
- Need not be evidence of actual private investor in comparable circumstances but it helps ...

Criterion (2) through state resources



- Art. 107(1) “*any aid granted by a Member State or through State resources in any form whatsoever*”;
- Includes aid granted by central, regional or local government: see Case 76/76 ***Steinike and Weinlig v Germany*** [1977] ECR 595;
- Includes aid granted by companies and agencies established by the state to distribute public funds

Criterion (3) Selectivity



- Art. 107(1) “*favouring certain undertakings or the production of certain goods*”
- (1) “Undertakings”:
 - Wide; all entities engaged in economic activity (putting goods, services on market); covers self-employed professionals;
 - Can include non profit bodies, charities, universities etc if offering goods and services on the market;
 - Includes “public undertakings” if public authority involved in commercial activity;
 - Does not apply to individuals; private households or employees.

Criterion (3) Selectivity cont.



- (2) Selectivity:
 - A benefit to all businesses is not State aid but a general measure;
 - Must favour some undertakings (or goods) over others e.g. on geographical, sectoral or type of firm basis;
 - Measures justified by the nature or scheme of the system:
 - classic example higher rates of tax;
 - ***British Aggregates v Commission*** [2008] ECR I-10505 (aggregates levy to some forms of aggregates – held not justified)

Criterion (4) - competition



- Potential to distort is sufficient for test to be met;
- There is no necessity to show actual effects;
- Small amounts of aid seen as threatening distortion; does not need to be substantial or significant distortion;
- Commission interprets this very widely
- View appears to be almost any intervention in the economy by the state has potential to distort

Criterion (4) inter-state trade

- Art. 107(1) *“in so far as it affects trade between Member States”*;
- Most goods and services are seen as tradeable;
- Commission interpret this test very widely;
- Argument no inter-state trade element difficult:
 - Sufficient if product or service is capable of inter- state trade
 - Even if beneficiary of aid does not export, or exports only outside the EU
- The **Altmark** case; *“ ... [n]o threshold or percentage below which it may be considered that trade between Member States is not affected”*
 - Subsidy for local bus service in Germany;
 - May keep operator in business, and so provide operators in other Member States with less chance of providing service instead

De Minimis State aid



- Regulation 1998/2006 general *de minimis* rule:
 - Allows aid up to €200,000 per undertaking over a rolling 3 year period;
 - Also guarantees up to €1.5m;
 - Different rules for some sectors;
- If within Regulation, deemed not a State aid under Art. 107(1) and so exempt from notification – assumed negligible impact on competition and trade;
- SGEI *de minimis* Regulation 2012: aid to undertakings providing services of general economic interest (see below) - up to €500,000 per undertaking over a rolling 3 year period
 - SGEI Guide (Feb 2013)

Exemptions

Art. 107 (2) and (3)



- Art. 107(2) “*shall be compatible with the internal market*”
 - (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
 - (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
- Art. 107(3) “*may be considered to be compatible with the internal market*”:
 - (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;
 - (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
 - (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
 - (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
 - (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission

Art. 107(3)



- Confers a discretion on Commission to approve State aid
- (1) BLOCK EXEMPTIONS under s. 107(3):
 - Most important: the General Block Exemption Regulation (“GEBR”)(2008)
 - If covered by block exemption: no need for notification;
- (2) OTHER CASES (outside block exemption):
 - Require notification and assessment
 - Case by case decision/balancing exercise;
 - But many Commission Guides, even if meet must notify and be approved (see e.g. Environmental Protection 2008/C 82/01;
 - State aid No. N 356/2006 – United Kingdom Historic Environment Regeneration Scheme

Art. 107(3) cont.



- GBER: a number of block exemptions: including environmental;
- Current GBER in force until December 2013;
- GBER under review; consultation – new GBER anticipated for 2014
- Enabling Regulation under which GBER made expanded as part of State aid modernization to include new categories of aid that can be subject of a block exemption including aid for culture and heritage conservation (subject of Art. 107(3)(d) see above).

State aid Procedures: The Commission (1)



- Summary: key points
 - (1) State aids within Art. 107(1) must be notified to the Commission
 - If outside Art. 107(1); no need to notify;
 - If *de minimis* or subject or GBER no need to notify;
 - If aid granted under an aid scheme already authorised by the Commission no need to notify;
 - But obligation does apply if compatible with internal market under Arts. 107(2) or (3) but not under GBER/already authorised;
 - Slow process; if no response 2 months deemed approved; but BIS say can take 6 – 9 months;
 - A State aid that is not notified is *automatically* unlawful;
- See further Art. 108; and various Regulations, including 659/1999 – the Procedural Regulation (there is also a simplified procedure for some cases)

State aid Procedures: The Commission (2)



- (2) Complaints/investigations
 - Initial process; Commission write to the UK and seek views – interested parties limited rights;
 - Can reach preliminary conclusion not a State aid under Art. 107(1) and close the case; not binding can re-open; can take a year
 - Can institute formal investigation under Art. 108(2);
 - Length of investigation; no mandatory period but Procedural Regulation says indicative period - 18 months;
 - Focus of procedure on Member State; interested parties more limited rights;
 - Decision; if unlawful State aid can order recovery plus interest;
 - Can be challenged in the General Court; with appeal to CJEU.

State aid: domestic challenges



- (1) Judicial Review (or similar) of decisions on basis involve unlawful State aid;
 - Limited examples
 - See below *Winchester* case
- (2) Actions for recovery of unlawful State aid;
- (3) Damages actions for losses caused by grant of unlawful State aid;
- (4) Interim relief: suspension of payments.

Specific Issues: Sale of Land



- Communication on State aid elements in sales of land and buildings by public authorities C209/3
- 2 alternative conditions which if satisfied mean Commission will not treat as a State aid;
 - (1) A sufficiently well-publicised, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid;
 - (2) Independent valuation.

Specific Issues:

The grant of planning permission (inc. S. 106 and CIL) (1)



- BIS Guide:
- *“Land and property development/regeneration. There is no formal Commission framework as such for land and property regeneration, but there are several schemes in the UK which have either received Commission State aid approval, or which the Commission confirmed as not involving Article 107(1) State aid”.*
- (1) Grant of planning permission itself: no, see ***Bow Street Mall Ltd & Ors*** [2006] NIQB 28;
- (2) Accepting less by way of s. 106 contributions than the scheme would otherwise require, because overall planning balance favoured grant of planning permission: arguably not, why?
 - Not a tax; must be agreed;
 - Part of overall planning balance; decision in “public interest”;
 - Viability material consideration;

Specific Issues: The grant of planning permission (inc. S. 106 and CIL) (2)



- (3) Variation of s. 106 to release developer from obligations previously agreed to:
 - more difficult,
 - some Commission decisions;
- (4) CIL;
 - different - it must be levied;
 - Can grant relief; but CLG Guidance warns of State aid issues and use of the GBER in relation to social housing

Specific Issues: CPO Procedures (1)



- CPO a common area for State aid issues; especially objectors to a CPO:
- (1) compensation for expropriation not normally state aid:
 - See Case T-53/08 *Italy* and Case T-62/08 *ThyssenKrupp*;
 - Recent Commission decision (SA.3225) no State aid in payment of compensation under Dutch Expropriation Act;
- (2) What are the issues, where CPO in favour of developer:
- (A.) Use of CPO powers itself a State aid; no, if indemnity for costs from developer;

Specific Issues: CPO Procedures (2)



- (B.) Various arguments re compensation:
 - Marriage value: Winchester City Council (Silver Hill) Compulsory Purchase Order 2011; going to High Court;
 - Compensation: not full market value in some way e.g. “no scheme world”
 - Answer?
 - Legislation setting land values should aim to set price as close as possible to market value, see Case C-239/09 **Seydaland**;
 - Statutory scheme overall is based on market value;
 - Possibility of going to UT (Lands Chamber)
 - Arsenal CPO 2004 S/S said premature to raise at CPO inquiry issues based on difference between amounts paid in compensation and price land sold to developer for

Specific Issues: environmental protection



- EU high profile to environmental protection
- 3 stages:
 - (1) is it a State aid at all; meet all criteria?
 - (2) GBER exempts some environmental aid
 - (3) Environmental Aid Guidelines 2008

Example 1: contaminated land; generally polluter pays but if can't be identified or can't bear costs, Guidelines allow costs of remediation minus value of land; up to 100%

Example 2: Guidelines also deal with aid for waste management.

Specific issues: Infrastructure (1)



- Generally, the provision by public authorities of infrastructure, such as the building of roads or bridges, open to the public has been held by the Commission not to constitute State aid. Thus:
- (1) Quigley State aid Law and Policy (2nd ed) at p 48 says: “ ... *investment in infrastructure which benefits undertakings generally, rather than one or more specific undertakings, is regarded as a general measure which does not amount to State aid ... Financing of transport infrastructure, such as roads ... built and maintained by public authorities, does not constitute State aid*”
- (2) Hancher, Ottervanger and Slot EU State Aids (4th ed) at 3-058: “[t]he general rule is that if the infrastructure is provided for general use as opposed to a dedicated purpose, benefiting no particular user, then there is no selectivity and hence no aid at the level of the user. The construction of a road, for example, is usually regarded as general infrastructure ...”

Specific issues: Infrastructure (2)



- (3) the CJEU in Case C-164/02 **Netherlands v Commission** [2004] ECR I-1177 at para. 7 and quoting from Commission Decision N 812/2001:
 - *“Financing by the authorities of infrastructure open to all potential users without discrimination and administered by the State does not generally fall within the scope of Article 87(1) of the EC Treaty because it does not favour one undertaking in competition with other undertakings within the meaning of that article. That is the case for most of the funding of transport infrastructure (for example, roads and canals built and maintained by the public authorities)”*
- (4) Commission Decision 2003/227/EC Terra Mitica OJ 2003 L91/23 *“although the increase in traffic may be due to the park, the roadworks carried out affect everyone living in the area”*

Specific issues: Infrastructure (3)



- Cases T-443/08 and T-455/08 *Freistaat Sachsen v Commission* upheld on appeal by the CJEU in Case C-288/11 P *Mitteldeutsche Flughafen AG and another v European Commission* [2013] 2 C.M.L.R. 18.
- Increased scrutiny of infrastructure?
 - Findings are focused on developments in the airports sector;
 - On the facts of that case the infrastructure consisted of the construction of a runway to an airport which was an integral part of the principal economic activity carried out by the airport operator and which would be commercially exploited by the operator who “*will not make it available without charge to users in the common interest but will charge users for its use*” (see the General Court’s judgment at para. 94).

Specific issues: Infrastructure (4)



- Position must be different for, for example, a road which is not to be commercially exploited; but rather open to the general public;
 - Roads operated by a concessionaire would be State aid see e.g. Commission decision N134/2007 concerning the Thessaloniki Submerged Tunnel Project and N 151/2009 on aid for the construction and operation of the A1 Motorway, Gdansk-Torun section;
- Guidance since case seems to support: see “State Aid and Infrastructure - Leipzig Halle Guidance ERDF-GN-1-010” produced jointly by the Commission and the UK Government;
- Commission document COMP/03/2011/ NOTE TO DG REGIO entitled “Application of State aid rules to infrastructure investment projects”: “Public, non-commercially operated roads/motorways”. These are “Activities falling within the public remit” and are “[a] contrario application of the Leipzig/Halle judgment”

Specific issues: Infrastructure (5)



- Also CJEU in Leipzig/Halle case
 - *“it is not important that the General Court observed ..., that “runways are essential for the purposes of the economic activities performed by an airport operator”, that “the objective of constructing a runway is linked to the main economic activity of an airport” and that the “construction and extension of the runway [are] pre-conditions for its operation”. Those considerations are, admittedly, unsuitable, by reason of their general nature and because they might also apply to certain activities which fall within the exercise of State authority, for establishing the economic nature of a given activity of airport infrastructure construction”*

Specific issues:

Payments for public services (1)



- Case C-280/00 *Altmark* [2003] ECR I-7747
- Subsidies for local bus service
- CJEU: not a State aid where monies compensate for public service obligations provided by an undertaking such that it does not enjoy a real financial advantage
- 4 conditions:
 - (1) Clearly defined public service obligation;
 - (2) Objective parameters for calculation of compensation;
 - (3) No overcompensation;
 - (4) Efficient undertaking comparison: either via procurement or analysis of costs of a typical well run undertaking
- If meet then not State aid at all

Specific issues:

Payments for public services (1)



- If State aid need consider Art. 106(2) and services of general economic interest (SGEI)
- Notification required even if an Art 106(2) case
- Decision; Framework and Communication on these;
- If in Decision like a block exemption ...

State aid Modernisation



- On 8 May 2012, the Commission set out a State aid reform programme in the Communication on “State aid modernisation”
- Endorsed by European Parliament; the Economic & Social Committee and the Committee of the Regions
- AIMS
 - (1) identify common principles for assessing the compatibility of aid with the internal market, across various guidelines and frameworks;
 - (2) revise, streamline and possibly consolidate State aid guidelines to make them consistent with those common principles in a number of areas including Environmental aid;
 - (3) to revised the GBER; the Enabling Regulation, the *de minimis* Regulation and the Procedural Regulation
 - (4) to clarify and better explain the notion of State aid.

Some practical tips:

- No need to be a State aid expert; but need to be able to spot a potential State aid issue;
- Increasingly relevant in local government;
- Consider State aid early:
 - more time and ability to make changes to what proposed to avoid being a State aid; or
 - to notify etc;
- Take specialist advice;
- Be aware of consequences of getting it wrong.