

SLOUGH BOROUGH COUNCIL

Slough Innovation Space

State aid report

26 March 2020



1 OVERVIEW

- 1.1 Slough Borough Council (**Council**) is applying for ERDF funding under Priority Axis 1: "*enhancing research and innovation infrastructure and capacities to develop research and innovation excellence, and promoting centres of competence, in particular those of European interest* [1]". We have been asked to provide an independent State aid report to demonstrate how the project will comply with the State aid rules.
- 1.2 We are happy for the Council to share our report with the Ministry of Housing, Communities and Local Government (**MHCLG**), but please note that we have prepared it solely for the Council, and MHCLG should obtain its own advice as required.

2 SUMMARY OF ADVICE

- 2.1 The State aid rules¹ prohibit the State from providing selective financial support to an entity operating on any given market if doing so distorts (or threatens to distort) competition and affects trade within the European Union. Payment of the grant to the Council will engage the aid rules, and could result in aid at a number of different levels. However, in our view there are good grounds for concluding that they will be complied with for the following reasons:
- 2.1.1 the grant to the Council can be made by relying on the European Commission's German incubator decision, an exemption that applies where a local authority retains no benefit from the public funding. Although there are other potential ways of ensuring compliance, we consider this to be the most suitable and robust;
- 2.1.2 SMEs hiring facilities at the SIS (i.e. those not on the six month R & D accelerator programme (**Accelerator Programme**)) will be charged a market rate, and will therefore not be subsidised from State resources, for example, by way of below-market charges;
- 2.1.3 SMEs on the Accelerator Programme can be supported compliantly under the *De Minimis* Regulation,² subject to the Regulation's specific conditions being met, for example, not exceeding the threshold of €200,000. We consider that this is the simplest and most suitable method of ensuring compliance at this level, and is what we have frequently seen used in ERDF funded projects. If the specific conditions cannot be met in any particular circumstances, it may be possible to modify the form of aid so as to be able to rely on one or more of the exemptions in the General Block Exemption Regulation.³ For example, Article 22 permits aid for start-ups and Article 28 permits innovation aid for SMEs. As a final alternative, it may be possible to argue that an SME is not in fact an "undertaking" at that time on the grounds that it does not trade and is researching / testing an idea to bring to the market;
- 2.1.4 contractors appointed in relation to fit out and operation of the SIS will be procured in accordance with the applicable EU procurement rules and the broader ERDF procurement requirements.⁴ Where a contractor is appointed using a competitive tender under the EU procurement rules, there is very unlikely to be any aid as the market will have determined the level of payment for the services. This means that there is unlikely to be a subsidy to a contractor caused by paying more than a market rate. This will also be the case for procurements that are outside of, or below the EU procurement thresholds, as long as a transparent competitive selection procedure is used that is weighted towards price / value for money;

¹ Please note that our advice is based on State aid law as at the date of writing. The law may change after 31 December 2020, depending on whether a free trade agreement is reached with the EU, or whether the Government adopts a different regime.

² Commission Regulation 1407 / 2013 of 18 December 2013.

³ Commission Regulation (651 / 2014 / EU) of 17 June 2014.

⁴ ESIF National Procurement Requirements (ESIF GN 1-001, 16.8.19).

- 2.1.5 there will be no aid (direct or indirect) to any of the partners providing match funding or who are otherwise engaged in the project for a combination of reasons, for example, they will not be paid any grant, are not “undertakings” under the aid rules or will invest on market terms.
- 2.2 The Council’s use of the grant must fit with the ERDF rules around income generating projects. The Council has calculated that no net income will be generated by the SIS because all income received will be reinvested into additional floor space or otherwise improving the offering to SMEs, i.e. the benefit of the grant will be passed on to the SMEs and not retained by the Council. We recommend that the position is monitored to ensure that the rules are complied with. If net revenue is generated, MHCLG will be able to exercise its clawback rights in the standard ERDF funding agreement.
- 2.3 The support to be provided under the Accelerator Programme does not fit within any of MHCLG’s pre-notified ERDF schemes as the aid to the SMEs is not in the form of cash, loans beneath the reference rate or repayable advances.

3 BACKGROUND

- 3.1 The Council intends to fit out and operate unused Council office space as an innovation hub, which will be called Slough Innovation Services (**SIS**). In support of the project, it is applying for approximately £1.6 million of ERDF grant, 44% of the costs of the total project costs (approximately £3.7 million). Match funding will be provided as follows: the Council (£1.3 million in-kind), Thames Valley Berkshire LEP (£500k cash) and Heathrow Airport Limited (**Heathrow**) (£200k cash).
- 3.2 The project has three distinct elements, as set out in detail in the Full Application Form. These comprise:
- 3.2.1 fitting out a new 924 square metre research and development facility, providing desk capacity for 123 employees plus laboratory, meeting and collaboration space;
- 3.2.2 designing and operating the Accelerator Programme, which will help SMEs commercialise products and services; and
- 3.2.3 more broadly, acting as an innovation hub that will promote innovation collaboration amongst local authorities, businesses, academia and other innovation providers in the area, for example, by holding at least monthly events on relevant R & D topics and a quarterly “brains trust” workshop.
- 3.3 SMEs who wish to participate in the Accelerator Programme will have to pass a selection process, which will include satisfying core criteria. For example, at least 33% of their FTEs will have to be dedicated to R & D, and the product or service to be commercialised will have to align to the National Industrial Strategy’s “grand challenges” (artificial Intelligence and data, ageing society, clean growth and future of mobility).
- 3.4 When participating in the Accelerator Programme, SMEs will receive a range of free support including office or lab space, which has the primary objective of helping them commercialise products and services through R and D and innovation.⁵ SMEs who decide to remain in the SIS after completing the Programme will pay a market charge to use the facilities. At the end of the Programme, SMEs are expected to pitch to potential investors, for example, **Heathrow**, to raise private investment to support hiring new researchers and further investment in the product or services being commercialised.
- 3.5 The Council will procure a contractor to undertake the fit out works and an operator to manage the SIS and the Accelerator Programme. It will let both contracts in compliance with the Council’s internal procurement rules and the Public Contracts Regulations 2015 (to the extent applicable).

⁵ More detail is set out in the Full Application Form, for example, pages 6-7.

- 3.6 The Accelerator Programme will be promoted by Royal Holloway University and Brunel University to students and alumni, and by Thames Valley Berkshire LEP (through the Berkshire Growth Hub).
- 3.7 SMEs not on the Accelerator Programme may hire space / facilities in the SIS for a market rate.
- 3.8 The Council will fund the SIS after expiry of the three-year ERDF grant period to the extent that it is not self-funding (it is not currently expected to be).

4 OVERVIEW OF THE RULES

- 4.1 As context for our advice, we have included an overview of the State aid rules in Schedule 1. In summary, these prohibit the State from selectively using its resources to support an “*undertaking*” if doing so:
 - 4.1.1 distorts or threatens to distort competition; and
 - 4.1.2 affects trade between Member States.
- 4.2 The definition of “*undertaking*” is broad, and is determined on the basis of whether an organisation's activities are economic or non-economic rather than its legal status, for example, as a local authority.⁶ It will include any entity that offers goods or services on a market.⁷
- 4.3 There are five potential levels which could potentially create either direct or indirect aid, each of which is considered in turn below:
 - 4.3.1 to the Council as grant recipient;
 - 4.3.2 to SMEs who hire facilities at the SIS;
 - 4.3.3 to SMEs participating in the Accelerator Programme;
 - 4.3.4 to contractors engaged by the Council. For example, to fit out or operate the SIS;
 - 4.3.5 to other third parties supporting or otherwise engaged in the project, for example:
 - (a) Brunel University and Royal Holloway University;
 - (b) Heathrow;
 - (c) Berkshire Growth Hub;
 - (d) those who invest in an SME which has completed the Accelerator Programme.

5 THE COUNCIL

- 5.1 Although a local authority, the Council can be classified as an “*undertaking*” for State aid purposes if it offers goods or services on a market. It is possible that the fit out and operation of SIS could result in the Council being classified this way. Although there would be scope to argue that the Council is not in fact an undertaking on the basis that it is performing a statutory function in promoting economic development, the least risky and more robust approach would be to rely on the German incubator decision. The Council's in house legal advisers previously identified this option in their letter to MHCLG of 19 February 2020, and the decision and why in our view it can be relied on here is explained below.

⁶ *Van Landewyck* (Joined Cases C-180/98 to C-184/98).

⁷ Case 118 / 85 *Commission v Italy* [1987] ECR 2599.

German incubator decision

5.2 A decision of the European Commission (**Commission**) has established that the public funding of local authorities to support the construction and operation of incubation centres for SMEs will not breach the State aid rules if the authority retains no benefit – this is known as the German incubator decision.⁸ Funding at the "top level" (i.e. local authority) was held by the Commission to be compliant on the basis that the benefit flowed down to the SMEs, and at that level complied with an existing exemption from the rules (considered in paragraph 7 below). A more recent decision confirmed this approach is compliant i.e. that at the top level the entity is acting merely as an intermediary.⁹

5.3 The Commission recognised in the incubator decision that the authorities were trying to solve a perceived market failure, and therefore used the funding to procure contractors to construct and operate new centres. The relevant part of the decision is quoted below because it clearly explains the rationale (reference to "providers" is to the local authorities. We have highlighted key text in bold):

*"(29) Under the measure in question, **the providers are responsible for constructing and managing a centre**. They are thus creating the possibility that a centre can rent out premises and/or offer other services to SMEs. Even if they are non-profit bodies, **they are performing an economic activity which** could be carried out by, for example, private real estate firms or private consultancies.*

*(30) However, **the providers are not supposed to benefit themselves** from the measure as the State aid is intended to make premises and services **available to SMEs**. Indeed, the State resources granted to the providers are intended to confer an economic advantage **solely on the users**. Several mechanisms ensure that no advantage will remain at the level of the providers.*

*(31) A public **invitation to tender** for the **construction or extension** of a centre will be organised in compliance with **public procurement legislation**.*

*(32) The **providers are obliged to transfer the possession or use of the centre to the users** for at least 15 years. To that extent, they do not to receive an advantage over that period of 15 years, during which the buildings have to be used as centres.*

(33) However, as the centres will remain in the ownership of the providers after 15 years and as long as no compensation is payable for the residual value, their value could constitute an advantage for the providers (the owners of the building) as they could then be used for other activities or sold. In order to ensure that no advantage remains at the level of the providers after 15 years, the German authorities undertook, in the course of the Commission's investigation, to ensure that profits will be absorbed after that period. This will be done either by applying the discounted cash-flow method or, in any case, on the basis of a method corresponding to the method provided for in Article 29(4) of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (8). All the revenue earned and losses incurred by the providers during the 15 years will be taken into account, including the residual value of the building. This suggests that the business activity of the centres should be placed at the level of the providers as it is the latter that will ultimately bear the economic risk attaching to a centre.

*(34) **Since the providers do not receive any economic advantage**, they cannot be regarded as beneficiaries of State aid within the meaning of Article 87(1). They can be considered to be only the **vehicles for making assistance** available to the users via the centres."*

5.4 In our view, the SIS project is similar enough to the facts of the German incubator decision to enable the Council (and MHCLG) to rely on it. The key issue is to ensure that the Council does not itself

⁸ Commission Decision of 3 May 2005 (2005 / 782 / EC).

⁹ State Aid SA.41540 (2015/N) – Republic of Lithuania Aid to public legal persons - Science and Technology Parks.

benefit from the ERDF grant i.e. that its financial position is not improved during or after the project (assuming SIS does not operate indefinitely). This will be achieved by:

- 5.4.1 undertaking competitive procurements in accordance with the applicable EU procurement rules to appoint third parties to provide the following works and services rather than the Council doing so:
 - (a) works contracts for fit out of the floor space to be used as the SIS;
 - (b) a service contract for the operation of the SIS, including provision of the Accelerator Programme;
 - 5.4.2 passing on the benefit of the ERDF grant to SMEs by providing the Accelerator Programme for no charge;
 - 5.4.3 reinvesting income (for example, rental / hire payments) into the Accelerator Programme or maintenance and operating costs for the SIS, so that there is no immediate or residual benefit to the Council during or after the operation of the SIS;
 - 5.4.4 it will also be necessary to demonstrate that the effect of the works does not improve the value of the asset held by the Council. Accordingly, the initial valuation (required for valuing the match funding element) should also be accompanied by an opinion as to the value of the floor after the end of the operational period to establish whether the Council gains any residual value. This could be confirmed at the end of the operational period.
- 5.5 There are a number of potential alternatives, considered below, but we consider that the incubator decision is the most suitable and robust for this project provided that processes are in place to ensure no benefit is retained by the Council during or after the project.

General Block Exemption Regulation

- 5.6 The General Block Exemption Regulation¹⁰ (**GBER**) contains a number of categories of pre-approved "good" aid that may be given without breaching the rules as long as a number of specific and general conditions are met. We have considered the most relevant below.

Article 26 – investment aid for research infrastructure.

- 5.7 Article 26 permits investment aid for research infrastructure. Although there would be scope to consider this option, in our view SIS project fits squarely within what is permitted by the German incubator decision and so we have not considered Article 26 in any more detail.

Article 27 – aid for innovation clusters

- 5.8 Article 27 permits aid for "innovation clusters" in defined circumstances. In our view, it would be difficult to do so because (1) the SIS and its activity does not fit squarely within the definition of innovation cluster, (2) it would only permit aid to be granted to the Council and not those on the Accelerator Programme and (3) the fees for use of the SIS would have to correspond to the market price or reflect actual costs.

Article 56 – local infrastructure

- 5.9 Article 56 permits aid for the construction or upgrade of local infrastructure which will contribute to improving the business and consumer environment locally, and modernising and developing the industrial base. Business incubators have been recognised as falling in the definition of local infrastructure. However, a key condition of Article 56 is making the infrastructure available on an open, transparent and non-discriminatory basis for a market charge, which will not be the case here.

¹⁰ Commission Regulation (651 / 2014 / EU) of 17 June 2014.

The SIS and income generation

- 5.10 The Council has indicated in section 5.9 of the Full Application Form that the SIS will not generate any net income because “*the income will be used as a funding source to achieve break-even of costs vs. funding* []”. Section 5.9 relates to the rules around revenue generation in Article 61, EU Regulation 1303 / 2013 and Regulation (EU) 480 / 2014. Under ERDF rules, net income under Article 61 is deducted from the eligible costs for the purposes of determining the level of aid available from ERDF, which is capped at 50%.
- 5.11 The Council has calculated and confirmed to us that there will be no net revenue from the SIS. On the basis, the rules around income generation will be satisfied, and in addition the Council will be able to demonstrate that it will not retain any benefit for the purpose of the German incubator decision. We note that the Accelerator Programme users will not be paying and the income is limited to those bodies falling outside this. This can properly be netted off against the costs of maintaining the facility, and the replacement of short term equipment.
- 5.12 The Council will need to regularly review and monitor whether it is generating net revenue to ensure that the rules remain satisfied. If the position changes such that net revenue is, or is likely to be, generated then we would expect it to discuss with MHCLG proposals for use of the revenue. If agreement cannot be reached on this then MHCLG should be able to rely on clawback provisions in the funding agreement, which we would expect to be exercised on a pro rata basis in light of the proportion of eligible costs funded from the grant.

6 AID TO THOSE HIRING FACILITIES

- 6.1 SMEs not on the Accelerator Programme may hire SIS facilities, although we understand that they will be charged a market rate. No aid will therefore exist at this level: it is an established principle of the State aid rules that if resources or services are provided on market terms there will be no element of subsidy by the State.¹¹ We do not therefore consider that the grant will create aid to SMEs who pay a market rate for using SIS facilities.

7 AID TO THOSE ON ACCELERATOR PROGRAMME

- 7.1 SMEs on the Accelerator Programme will receive facilities and support for no charge, which would potentially breach the State aid rules as a transfer of State resources to a market operator on below-market terms. As the thresholds for the third and fourth conditions that must be met for State aid to exist (distorting or threatening to distort competition and affecting trade within the EU) are very low, it would be prudent to assume that they would be met here. However, there are two main ways of providing the facilities and support compliantly. In our view, the first option, the *de minimis* Regulation,¹² is the simplest in view of the relatively low financial level of support and the lighter compliance obligations. In this respect, we note that the Commission's GBER Frequently Asked Questions recognise that this Regulation may be relied on, for example, for “*final beneficiaries*” where aid could exist at several levels (FAQ 109), and for users of “*publicly supported infrastructure...provided that all the applicable conditions [of the de minimis scheme] are respected*” (FAQ 126).
- 7.2 It should be noted that depending on the individual or organisation on the Programme, it is possible that they may not be an “undertaking”, due to the early stage of development of their product. If they are not an undertaking, the State aid rules will not apply to them.

De Minimis

- 7.3 First, the *De Minimis* Regulation permits transparent aid to be given on condition that the specified financial threshold is not exceeded; the total amount of aid to an entity over any given three-year

¹¹ For example, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, *Commission v EDF*, C-124/10 P, ECLI:EU:C:2012:318.

¹² Commission Regulation 1407 / 2013 of 18 December 2013.

fiscal period must not exceed €200,000. The value of aid must be quantified and converted in advance into a gross grant equivalent if its amount is unclear (using the MHCLG guidance on doing so). There are also strict monitoring requirements, which the Council will have to meet. Subject to that, we understand that the level of aid will fall below the threshold and so this Regulation should be applicable.

- 7.4 When calculating the level of aid already provided to ensure the threshold is not exceeded, the *De Minimis* Regulation defines "single undertaking" in a way that means the recipient and its parent company (if any) must be viewed together. Assuming this is below the ceiling, the Council would need to obtain a certificate confirming that the additional aid will not cause it to exceed the ceiling. A template certificate is provided in Schedule 3 of MHCLG's State Aid guidance (click [here](#)).
- 7.5 Given the nature of the aid here, it important to ensure that the value of the support is properly calculated, which for any provided in house should be by way of benchmarking the costs using three comparators. Where, as is the intention here, the Council procures external support through an open, transparent and competitive procurement, that price or hourly rate can be used.
- 7.6 Avoiding aid to undertakings in financial difficulty is not a requirement of the *de minimis* rules, but in any event the Council will be requiring confirmation that recipients are not in financial difficulty.

General Block Exemption Regulation

- 7.7 As explained earlier, GBER contains a number of categories of pre-approved "good" aid that may be given without breaching the rules as long as a number of specific and general conditions are met. If the *De Minimis* Regulation cannot be relied on, GBER contains a number of exemptions that could potentially be used. For example, aid for start-ups (Article 22) or innovation aid for SMEs (Article 28). It will be necessary to ensure that any aid under GBER is sufficiently transparent, i.e. that a gross grant equivalent can be calculated, if this approach is to be adopted. Adopting a similar process as for valuing *de minimis* aid should suffice. We suggest we consider how GBER compliance could be dealt with if the Council is unable to rely on the *de minimis* Regulation in any particular circumstances.
- 7.8 Any aid under GBER must meet the general requirements under Part II, GBER as well as the specific requirements of the individual exemption. In particular, there is a requirement for aid to be transparent, and to have an incentive effect.
- 7.9 If the Council uses a GBER exemption, it would need to comply with the reporting requirements, and notify the aid within 20 working days of provision. We would be happy to provide more detailed advice on GBER if that would be helpful, but have not done so in this note because of the likelihood that the Council can rely on the *de minimis* rules.

8 AID TO CONTRACTORS

- 8.1 As acknowledged in the Full Application Form, the Council is a contracting authority under the EU procurement rules and has committed to complying with them (to the extent that they apply) when letting the works and operator contracts for SIS. Where a contractor is selected using one of the competitive procedures in the EU procurement rules, the State aid rules will not be breached because:
- 8.1.1 an open and transparent tender process will have removed any selectivity i.e. the market will have been given the opportunity to bid for the contract; and
- 8.1.2 the tender process will have established market rates, meaning there is unlikely to be any subsidy in payments for the works or services. The market economy operator principle has developed as an exemption to the State aid rules, and is available where a contractor is selected by way of an EU-compliant competitive procurement.

- 8.2 In conclusion, a contractor in these circumstances will therefore not be a recipient of aid as it will be providing services for value, tested through a competitive process, and to the extent that any aid element is involved, it would not distort competition as the benefit has been openly competed.
- 8.3 This rationale will also apply where a tender is not run under the EU procurement rules, for example because they do not apply or the contract value is below the relevant threshold, as long as the tender is advertised publicly with bids assessed on objective criteria, and a significant weighting being allocated to pricing. The Council's Contract Standing Orders require it to let any such contracts this way (as well as comply with the EU procurement rules when they do apply). There is therefore unlikely to be any unlawful aid at this level.

9 PARTNERS / OTHER THIRD PARTIES

- 9.1 As mentioned in the Background, there are a number of other third parties involved in the SIS project which could potentially receive aid indirectly, although we consider it very unlikely that any of them will do so. To ensure this remains the case, we recommend that the Council monitors the position by considering whether State aid could be provided if the project is changed, for example, grant is paid to any such party or they are allowed to exploit / invest in a product or service on below-market terms.

9.1.1 **Brunel University and Royal Holloway University.** There are two main reasons why these bodies will not receive aid. First, the Council is not paying them any of the grant and so there is no transfer of State resources to them. Second, they are very unlikely to be classified as "*undertakings*" for the purpose of the State aid rules: both are universities within the public education system. Commission guidance and case law has set out what activities may be regarded as non-economic, and this includes public education,¹³ including by universities. These recognise that where public entities act "*in their capacity as public authorities*"¹⁴ they will not be engaged in economic activity even if it would theoretically be possible for a private sector entity to offer the same goods or services.

9.1.2 **Heathrow.** There are also two main reasons why we do not consider there will be any aid at this level. First, no grant will be paid to Heathrow and therefore there is no transfer of State resources (in fact, Heathrow is providing match funding of £200k). Second, if it decides to invest in an SME which has completed the Accelerator Programme and intends to further develop a product or service that could be of commercial use to Heathrow, we would expect the investment to be on market terms. The point of the Accelerator Programme is to use R & D to commercialise products and services, which would be defeated if an SME then accepted an equity investment on less than market terms either to Heathrow or an equivalent investor. As long as such investment is on commercial terms then there will therefore be no aid at this level.

9.1.3 **Berkshire Growth Hub.** We understand that the Hub is funded by ERDF grant and the Thames Valley Berkshire LEP, and is operated by Oxford Innovation Services. We do not consider that there will be any aid to the Hub because: (1) it will not be paid any of the grant, and therefore there will be no transfer of State resources, (2) according to its website, the Hub does not charge for providing business support and therefore would not benefit financially from SMEs referred to it by the SIS, and (3) the Hub in any event may not be an undertaking under the State aid rules, but instead a publicly funded body providing information to the business community on an open and non-discriminatory basis.

9.1.4 **Future investors / external funders for SMEs completing the Accelerator Programme.** The reasoning in relation to Heathrow would be also apply at this level.

¹³ C-318/05 *Commission v Germany* [2007]. *Case C-263/86 Humble and Edel* [1988] ECR I-5365, *Case C-109/92 Wirth* [1993] ECR I-06447.

¹⁴ C-30/87 *Bodson* [1988].

10 PRE-NOTIFIED MHCLG SCHEMES

- 10.1 We have considered whether the Council could rely on any of the MHCLG pre-notified ERDF GBER schemes (please see [here](#)). For example, English Aid for access to finance for SMEs, which is based on Article 21 (risk aid) and Article 22 (start up aid), and English Aid for SMEs, which is based on Article 17 (investment aid), Article 18 (consultancy aid), Article 19 (aid for participation in fairs) and Article 20 (cooperation costs of participating in European Territorial Cooperation projects). However, these schemes explicitly only permit aid in the form of grant, loans below the EU proxy reference rate and repayable advances, and so cannot be used unless the current project was redesigned.

Bevan Brittan LLP
26 March 2020

SCHEDULE 1 – STATE AID OVERVIEW

1 WHAT IS STATE AID?

- 1.1 State aid is a concept deriving from European law, in particular articles 107 and 108 of the Treaty on the Functioning of the European Union (**Treaty**). It has been interpreted broadly to include many different forms of financial assistance, both direct and indirect, for example, grant funding, loans at below the market rate, the provision of premises, equipment or staff at a discount, foregoing tax revenue and equity investment on below-market terms.
- 1.2 State aid is unlawful unless permitted under the Treaty, or by the European Commission pursuant to the regulatory framework under the Treaty. Article 107 states:
- "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 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."*
- 1.3 The definition can be reduced into four limbs:
- 1.3.1 the assistance must be granted by the State or through State resources;
 - 1.3.2 the assistance must favour a certain undertaking / group of undertakings (i.e. an entity / entities engaged in economic activity) or the production of certain goods (with the concept of assistance being widely construed);
 - 1.3.3 the assistance must distort or threaten to distort competition; and
 - 1.3.4 the assistance must affect trade between Member States, or be capable of having an effect on cross-border trade.
- 1.4 Assistance will only constitute State aid if each of the four conditions is satisfied. If one or more are not met, a proposed scheme will fall outside of the definition in Article 107. For example, if the recipient is not in fact an "undertaking" or aid will have only a local effect. In addition, aid can be made compliant by:
- 1.4.1 notifying and obtaining approval from the Commission under Article 107(2) or (3) through the formal clearance process;
 - 1.4.2 relying on an existing exemption, for example:
 - (a) the market economy operator principle – essentially, that there would be no aid because the "benefit" flows from the transaction on market-facing terms;
 - (b) the General Block Exemption Regulation;¹⁵
 - (c) the *De Minimis* Regulation;¹⁶
 - (d) the rules governing provision of services of general economic interest, and in particular the services of general economic interest decision.¹⁷
- 1.5 The consequences of breaching the rules are serious, and can result in the Commission bringing infringement proceedings against the Member State. If a complaint is successfully made to the Commission, the recipient can be ordered to repay the aid plus interest at the statutory rate. A claim

¹⁵ Commission Regulation (651 / 2014 / EU) of 17 June 2014.

¹⁶ Commission Regulation 1407 / 2013 of 18 December 2013.

¹⁷ Commission Decision (2012/21/EU).

for damages can also be brought in the UK courts, for example, by a competitor who feels that they have suffered loss as result of not being given the same level of support. The limitation period for lodging a complaint with the Commission is ten years, and as there is no charge for doing so, it is relatively easy to bring a challenge this way.