



State aid law: FAQs

August 2020

State aid law

State aid law is at the forefront of national industrial strategy and a high profile subject in the wake of the COVID-19 pandemic and with the UK negotiating a future trade relationship with the EU following Brexit. These FAQs provide information on State aid law in the UK, including in response to the COVID-19 pandemic and the expected changes to the UK's State aid regime at the end of the UK's transition period.

1. What is State aid?

State aid law regulates the award of subsidies, with the objective of enabling all businesses to compete upon a level playing field.

The UK is currently subject to [EU State aid law](#) during a [transition period](#) agreed with the European Union that is at present expected to end at 11pm on 31 December 2020.

Under EU State aid law, a 'State aid' will exist if a measure involves a transfer of State resources that provides a selective advantage to one or more undertakings, which has the potential to distort competition and affect trade between Member States.

The award of a 'State aid' is unlawful unless the measure can be shown to:

- meet the terms and conditions of one of the European Commission's published *Block Exemption* Regulations; or
- satisfy the terms of a previously approved European Commission scheme; or
- have been approved by the European Commission through the notification process.

Most State aid awards are delivered lawfully and within the terms of block exemptions. Awards of public funding which do not meet all the criteria necessary to be deemed a State aid do not require such exemption mechanisms.

The UK has stated that it will establish a subsidy control regime after the end of the transition period with the EU, by way of replacement for EU State aid law as it currently applies.

2. What are the consequences of an award of unlawful State aid?

The consequence of an award of unlawful State aid is serious.

The beneficiary of unlawful State aid may be ordered to repay the full value of the benefit obtained, with compound interest backdated from the award of the grant. Furthermore, the process is public and causes significant reputational damage to the public body involved.

Challenges may come about through regulator investigation, national court challenge or various types of audit.

Organisations delivering public funded programmes should have appropriate systems in place to monitor compliance.

Public bodies which become aware of non-compliant awards are under a legal duty to recover unlawful aid, which makes it all the more important to get the correct advice at the point of award.

3. What changes have been made to State aid law during the COVID-19 pandemic?

The European Commission has approved over 50 aid specific aid [schemes](#) to help Governments across the EU (plus the UK while still in transition) respond to the Coronavirus pandemic.

At the heart of the State aid response is the new "**Covid-19 Temporary Framework**", which was adopted on [19 March 2020](#) and revised on [3 April 2020](#), [8 May 2020](#) and [29 June 2020](#).

The Temporary Framework sets out further State aid compliant options for Governments to provide support to businesses affected by the Coronavirus lockdown and also to accelerate R&D and the manufacture of treatments and devices which will help stem the Coronavirus pandemic. To use the Temporary Framework a Member State must obtain approval through the notification process.

Member States adopting measures which either do not qualify as State aid or fit within standard block exemptions need not avail of the temporary Framework.

The Temporary Framework is however a serious departure from normal State aid restrictions and offers major flexibility to grant lifelines to business, in addition to the many general measures such as tax reliefs that almost all countries are already adopting.

Nevertheless the Temporary Framework by itself is not a State aid block exemption. It does not give automatic approval to make awards of this nature without any further approvals. Member States seeking to avail of this must notify a specific aid scheme to the European Commission under the framework and have the same approved in order to be able to use it.

Until 29 June 2020, all undertakings that met the "[undertaking in difficulty](#)" test as at 31 December 2019 would not be eligible for support under the Temporary Framework. However, following many suggestions, the European Commission [amended the Temporary Framework](#), so that micro and small enterprises are now subject to a light touch test, which only focusses on whether the aid recipient was subject to insolvency action on 31 December 2019 and had outstanding obligations under the Rescue and Restructuring Guidelines.

4. UK general aid scheme under the Temporary Framework

The UK notified the "[State Aid SA.56841\(2020/N\) – United Kingdom - COVID-19 Temporary Framework for UK authorities](#)" on 6th April 2020.

This "umbrella" notification allows UK public sector bodies (e.g. local authorities, combined authorities, LEPs etc), as well as other organisations distributing public funds on their behalf, to make use of six of the ten options under the extended Temporary Framework, these being:

(i) Small amounts of compatible aid

This exemption allows grants (and other awards of public funding, for example repayable advances or tax advantages) of individual benefit up to €800,000 per undertaking. In order to be used, certain key conditions must be met:

- ensuring the recipient of aid has sufficient headroom to receive the funding (i.e. cumulated with any other COVID-19-related benefits under the Temporary Framework up to a maximum of €800,000);
- the aid must only be granted to undertakings that were not "in difficulty" on 31 December 2019;
- the final part of the aid is granted no later than 31 December 2020; and
- if aid is granted to undertakings active in the processing and marketing of agricultural products, the award is conditional on the aid not being partly or entirely passed on to primary producers / not fixed on the basis of the price or quantity of products purchased from primary producers or put on the market by the undertakings concerned.

The maximum aid which can be provided under the cover of the Temporary Framework is €800,000 per undertaking, or €120,000 for undertakings in the fishery and aquaculture sector and €100,000 for those in the primary production of agricultural products. The aid must be granted between 1 February and 31 December 2020.

The Commission in approving this aid measure has taken into account representations that the aid provided will be necessary,

appropriate and proportionate to remedy a serious disturbance in the economy. Public sector bodies awarding aid should be mindful about establishing a clear connection to the need for funding and the coronavirus, as well as seeking to only award the minimum aid necessary. We would expect government guidance to be issued on how to do this in due course.

(ii) Aid in the form of guarantees for bank loans

This exemption allows public sector bodies to provide liquidity support to undertakings through the use of guarantees. To support this, the Commission has published generous guarantee premiums (for both investments and working capital loans) which it shall regard to be compatible with the Common Market, provided other conditions are met.

(iii) Aid in the form of subsidised interest rates for loans

As with the above, the Commission has approved a more generous credit risk rating for loans, again with the aim of improving liquidity during this challenging time.

(iv) Support for coronavirus related research and development (R&D)

Public funded grants may be offered for up to 100% of the costs of fundamental research and 80% of industrial research and experimental development into coronavirus and other relevant anti-viral products. A 15% uplift for industrial research and experimental development is available where it can be shown there is cross border collaboration with research organisations or other undertakings.

v) Investment aid for testing and upscaling infrastructures

Public funded grants may be used to cover 75% of the costs of constructing or upscaling testing facilities (rising to 100% provided certain bonuses are present). This includes funding for medical products (including vaccines) and equipment (including ventilators, protective clothing and diagnostic tools) which help fight the spread of the virus.

(vi) Support for the production of products relevant to tackle the coronavirus outbreak

Public funding of up to 80% of the investment costs of setting up production lines / facilities to manufacture Covid-19 related products may be awarded (rising to 100% if certain technical bonuses are added). Aid shall not be awarded to undertakings which were '[in difficulty](#)' at 31 December 2020.

5. Other compliant ways to award State aid

There are many other ways public funding can be lawfully awarded, including structuring a measure in such a way as to avoid categorisation as a State aid at all. One example is a

general tax relief of benefit to all, which lacks the necessary selectivity.

Otherwise, the usual method to deliver lawful public funding to specific businesses is to use block exemptions. The most popular block exemption is the General Block Exemption Regulation (also known as "GBER") which is used for c. 97% of awards of State aid since 2014.

Also popular is the De Minimis Regulation which allows aid to be provided with relatively low administration up to a maximum of €200,000 (circa £170k at current conversion rates) per corporate group. The aid must not exceed this limit in the current financial year and two previous financial years. Such amounts mean little to multinational corporations but can be a lifeline to small businesses. National governments (and/or more localised forms of government) can readily adopt schemes to make use of this, assuming they can set aside the funds with which to do it to begin with.

Other exemptions also exist such as the Services of General Economic Interest (SGEI) Decision of 2012 and a limited number of nationally approved (by the European Commission) schemes.

6. State aid and Brexit

The UK withdrew from the European Union at 11:00pm on 31 January 2020.

Under the [Withdrawal Agreement](#) the UK shall be subject to EU State aid law for the duration of a transitional period. This is expected to end on 31 December 2020, unless the Joint Committee established under the Withdrawal Agreement adopts, before 1 July 2020, a decision to extend the transition period.

At the end of the transition period, if no trade agreement has been adopted then measures which affect trade between the EU and Northern Ireland will remain subject to EU State aid law under the [Northern Ireland Protocol](#).

If a trade agreement is adopted, then the UK shall be subject to the terms set out in such an agreement. At this time, the EU's agreed negotiating mandate states that:

"the envisaged agreement should uphold common high standards, and corresponding high standards over time with Union standards as a reference point, in the areas of State aid, competition, state-owned enterprises" (our emphasis)

In February 2020, UK Prime Minister Boris Johnson announced that the UK shall have a subsidy control regime in place by the end of the transitional period.

The details have yet to be published, but given the above, the most likely outcome is that the UK shall have a 'UK State aid regime' (possibly called 'subsidy control regime') at the end of the transition period.

The enforcement role was expected to transfer to the Competition and Markets Authority ("CMA") under arrangements made during Theresa May's administration. We anticipate that such a role will be formalised before the end of the transition period. Of course, making firm predictions is difficult at this time (especially given that the UK is involved in concurrent trade negotiations with the EU and the USA). Therefore, we shall update these FAQs as arrangements progress.

DWF has one of the largest dedicated State aid law teams in UK private practice and can draw upon market leading experts in our UK and other international offices. We have advised and continue to advise many of the leading public authorities within the UK and beyond, alongside a wide spectrum of the recipients of public funding, from multi-national manufacturers, to large and small scale real estate developers, urban regeneration specialists, SMEs, higher education institutes and research organisations, and charitable trusts.

Our experience in this area includes team members working within the European Commission, Central Government, Local Government and with private sector bodies receiving funds. We have worked on a wide range of European Commission State aid investigations, national and European court challenges, different funding audit investigations and on structuring different funds, schemes and individual awards towards compliance. We also have extensive experience of handling European Union anti-subsidy (trade defence) investigations under the WTO Agreement on Subsidies and Countervailing Measures, and representing affected exporters and sovereign governments in such cases before the European Commission.

We are on hand to discuss issues raised in these FAQs or any other element of State aid and subsidy law.

Related website profile

DWF State aid: <https://www.dwf.law/Expertise/Legal-Services/Commercial-Law/State-Aid#sectorTab=how-can-we-help-tab>

DWF COVID-19 Hub:
<https://www.dwf.law/Legal-Insights/2020/COVID-19>

Our credentials



Jonathan Branton
Partner, Head of Public Sector and
EU Competition
+44 7736 563 202
jonathan.branton@dwf.law

Jonathan has been an EU / Competition specialist for more than 25 years. In addition to regular aspects of Competition Law such as behavioural antitrust, cartels and merger control, he has a particularly strong reputation in handling all aspects of EU State aid law and practice, and public procurement. He has also worked extensively in international trade defence proceedings such as anti-dumping and anti-subsidy, including actions under the WTO anti-subsidy instrument.

Before joining DWF, Jonathan practised in Brussels for over 12 years having been a partner in an international law firm based there. He now leads DWF's EU / Competition team generally, and the firm's Public Sector group. He is also qualified as a solicitor in Ireland.

Ranked as a Number 1 leading individual in Chambers UK and the UK Legal 500 (Hall of Fame) directories for many years. Comments from clients (Legal 500) include: Jonathan Branton is an "expert Competition lawyer". DWF's 'top-tier practice' is led by 'star performer' Jonathan Branton, who is 'one of the foremost experts nationally for state aid and European Regional Development Fund (ERDF) advice'. He "provides technically sound and pragmatic, solution-based advice".



Alexander Rose
Director
+44 7545 200 457
alexander.rose@dwf.law

Alexander is a senior legal director in our Public Sector team. Before joining DWF, Alexander was a senior in-house solicitor for the UK Government, where he advised on State aid compliance for England's ERDF programme and six other national regeneration funds.

Alexander developed a reputation across Government for identifying State aid solutions and this led to his secondment in 2014 to the European Commission where he worked on State Aid matters at DG COMP and EU funds at DG REGIO.

At DWF, Alexander has a wide ranging practice advising public and private sector clients on matters relating to awards of public funding, including the technical aspects of State Aid law and issues relating to Brexit. He is also part of DWF's 'Audit Response Unit' where he assists organisations who are threatened with recovery of public funding, giving him the opportunity to draw upon his Government Legal Department experience in successfully defending ERDF projects from recovery in front of the European Court of Auditors in Luxembourg.

Alexander has an international profile for his EU law work, having spoken in the European Parliament, written national guidance on Public Procurement and contributed to a leading textbook on State Aid.



Jay Mehta
Senior Associate
+44 7713 342 305
jay.mehta@dwf.law

Jay has nearly 20 years' public sector experience in areas such as Structural and European Funding (ERDF, ESF, FP7), state aid, freedom of information and environment information regulations. This includes working with the North West Development Agency (NWDA) for seven years.

Jay is now a senior associate within DWF's EU/Competition team. Jay was a member of the cross-national EIB-sponsored JESSICA task force entrusted with developing state aid compliant JESSICA structures. Jay was also chairman of the BIS sponsored cross RDA state aid Technical Group where important national state aid issues were discussed.

Jay has provided state aid and ERDF compliance advice to a wide range of bodies on a full spectrum of projects, both from the perspective of grant awarding authorities and beneficiaries.

Jay has been involved in numerous recent state aid notifications and has been published on several occasions in European law journals. Chambers UK refers to Jay as, "a *Star associate who has been involved in a number of state aid matters*". Clients say: "He's very good at spotting the details that most wouldn't spot".



Beyond borders, sectors and expectations

DWF is a global legal business, connecting expert services with innovative thinkers across diverse sectors. Like us, our clients recognise that the world is changing fast and the old rules no longer apply.

That's why we're always finding agile ways to tackle new challenges together. But we don't simply claim to be different. We prove it through every detail of our work, across every level. We go beyond conventions and expectations.

Join us on the journey.