GUIDANCE ON STATE AIDS

Background

1. DETI, prior to devolution, under the devolved arrangements, and now under direct rule, continues to have a central awareness generation, co-ordination and advisory role in respect of State Aid issues (excluding agriculture issues on which DARD, locally, and DEFRA on a UK wide basis, lead).

Key Issue – State Aid Compliance and Risk Assessment

2. The key issue is the need to ensure that policies, their implementation and, in particular, operational programmes have been checked to ensure that they are compliant with State Aid rules. This is important to ensure propriety of public expenditure and, especially, to ensure the legality of such expenditure.

3. State Aid compliance is concerned with the Treaty of Rome, and, therefore, an international relations issue. In a devolved setting international relations are outside the bailiwick of the Devolved Administrations, and, accordingly, the final decision making authority is the UK Cabinet. Also, under direct rule, collective UK Cabinet clearance may be needed where there is dispute between a spending Department and DTI on handling of a State Aid risk. NI Departments can certainly exercise their own authority to take risks and, in doing so, could decide not to clear a position on State Aid with DTI or DEFRA or DOT as appropriate. However, where there is doubt, and especially where the risk is considered to be high, it is always prudent to seek legal advice. It is also important to alert Ministers and Accounting Officers in respect of any instances where

doubt exists about compliance and where DTI have not been consulted and/or it is proposed to ignore DTI advice.

STATE AIDS: NORTHERN IRELAND PUBLIC SECTOR ROLES AND RESPONSIBILITIES

1. The DETI State Aid Unit, in Policy Services, Tourism and Equality Division, has an awareness generation, co-ordination and advisory role in relation to State Aid issues. DETI carries out this role for all aspects of public sector activity, with the exception of agriculture matters on which DARD take the lead.

2. DTI's State Aid Branch (SAB) has overall UK co-ordination and policy decision making responsibilities with the exceptions of agriculture – on which DEFRA leads - and on transport, on which Department for Transport takes the UK lead role.

3. On Devolution it was agreed that SAB would have overall responsibility across all devolved administrations for:-

    - co-ordinating UK and State Aids;
    - providing advice on the application of State Aid rules; and
    - taking forward all notifications of aid with a European Commission in liaison with the United Kingdom Permanent Representative in Brussels.

4. Under the present direct rule arrangements it is still sensible to continue to apply the above framework.

EU State Aid Regime

5. EU Member States, as signatories to the Treaty, are responsible for ensuring compliance with Treaty's obligations in respect of competition policy and the harmonious operation

of the common market. These are enshrined in the State Aid compliance requirements, which are spelt out in Article 87(1) of the Treaty. This Article 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 production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market."

6. Accordingly, failure by Member States to comply with the Treaty can result in the issue of illegal aid. In which case the Commission is empowered to take proceedings to ensure that such aid ceases, any illegal aid is recovered and, depending on the circumstances, the appropriate Member State makes penalty payments.

7. For the above reasons, as part of general good governance of public expenditure, it is important to ensure that all programmes and policies are State Aid compliant.

Roles and Responsibilities

DTI State Aid Branch (SAB)

8. The DTI State Aid Branch has an overall co-ordination role. It is responsible for managing the UK application of State Aid rules on a consistent basis. SAB is the central point for notification of aids schemes to the Commission and for advising on the rules for handling aid within the public sector. This applies to policy proposals and existing programmes. As

State Aid issues are concerned with the Treaty and the UK's international relations they fall outside the bailiwick of the decision making powers transferred to Devolved Administrations.

DETI State Aid Unit

9. The DETI State Aid Unit has a co-ordination role within the NI system. It seeks to generate awareness, provide local advice on the design and handling of State Aid issues and assist DTI SAB by providing advice on handling which is consistent with the UK policy approach. DETI State Aid Unit has no authority to rule on State Aid issues. This falls to DTI (DEFRA and DOT) for all UK wide activity.

NI Departments and Other Public Sector Bodies

10. NI Departments and other public sector bodies have responsibility for ensuring that State Aid issues are addressed when policies are being designed and where programmes are being implemented. Ministers and Accounting Officers have ultimate responsibility for ensuring that policies, programmes and practices are compliant with EU, UK or transferred legislative and other mandatory requirements (eg equality checking, environmental impact assessments) and the propriety of ensuing expenditure.

Risk Assessments

11. Risk assessment is a key element in the handling of State Aid issues. Ultimately the final decision lies with the UK Cabinet. Risk assessment at the local level requires appropriate Ministers and Accounting Officers to be informed of any action

proposed where there is doubt about the State Aid dimension but, nevertheless, it is proposed that the risk be borne at local level. This is especially important if either DTI clearance has not been sought and/or is proposed to be ignored.

12. Accordingly, where there is any element of doubt about an aid it is advisable to seek the views of the DETI State Aid Unit, who, in turn will ensure that DTI are alerted and their clearance sought if necessary. Any DTI advice which signals doubt about the State Aid compliance nature of any policy or programme should be taken very seriously - as ultimate responsibility lies with the UK Cabinet (the national decision maker for deciding whether the UK is acting in compliance with State Aid Rules).

Operational Arrangements

13. Attached is a brief guidance annex which indicates the issues which need to be addressed in determining whether policy proposals, existing policies or programmes to implement them, fall within the State Aid ambit. It is recommended that where any doubts exist that initial contact be made with the DETI State Aid Unit.

STATE AID IDENTIFICATION CHECKLIST

Introduction

1. **State aid rules apply to organisations involved in economic activity ('undertakings').** The organisation does not have to be profit-making if the activity carried out is one which has commercial competitors. In some instances, public and voluntary sector organisations, such as universities and charities, could be classified as undertakings, as can the State itself.

5 Key Questions

2. There are **5 questions** you need to consider in order to establish whether a measure constitutes state aid**.** Only if you answer 'yes' to all 5 questions is state aid involved. **If you answer 'no' to one or more of the following, the funding is not state aid and therefore the state aid rules do not apply.**

    a. **Is the measure granted by the state or through state resources**? As well as central government departments, this includes regional or local authorities and other public or private sector bodies designated or controlled by the state. State resources include tax exemptions and also funds not permanently belonging to the state but under state control, eg lottery funding.

    b. **Does it confer an advantage?** A benefit to an undertaking, granted for free or on favourable (non-commercial) terms, could be state aid. This includes the direct transfer of resources, such as grants and soft loans, and also indirect assistance – for example, relief from charges that an undertaking normally has to bear, such as a tax exemption or the provision of services at a favourable rate.

    c. **Is it selective, favouring certain undertakings?** A general measure affecting the whole of the state's economy (eg nation-wide fiscal measures) is not considered a state aid, while aid that targets particular businesses, locations, types of firm (eg SMEs) or sectors is.

    d. **Is the activity tradable between member states? The** Commission's interpretation of this is broad – it is sufficient that a product or service is subject to trade between member

states, even if the aid beneficiary itself does not export to the EU. ***Consequently most activities are viewed as tradable.***

e. **Does the measure distort or have the potential to distort competition?** If it strengthens the position of the beneficiary relative to other competitors then there will probably be state aid implications. The distortion of competition does not have to be substantial or significant, and includes small amounts of aid and firms with little market share. ***Most interventions have the potential to distort competition.***

Rationale and Records

3. It is always important to document your rationale and record it in each case. It may be necessary to seek DTI agreement or persuade the Commission of your reasoning. Often DTI advise that an issue should be raised with the Commission to get a ruling that an aid is not a State Aid.

For further information contact:

ASHLEY RAY
State Aid Unit, Policy Services, Tourism and Equality Division, DETI
028 90 52963
ashley.ray@detini.gov.uk