State Aid

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Introduction

State Aid is the use of state funding or resources to support businesses (undertakings). Universities can be undertakings for the purposes of State Aid. Not all State Aid is unlawful but any State Aid which has an anti-competitive effect within the EU will be unlawful unless the aid comes with an exemption or the European Commission authorises the aid.

The UK will remain in the EU, and will be bound by its rules, for the immediate future. Although the UK's future status remains to be determined, it is worth noting that the same state aid rules apply to countries that are not in the EU but are in the European Economic Area. Countries outside of the European Economic Area may still need to regulate state aid as a condition of their trade agreements with the EU. In summary, it is reasonable to assume that there will be an ongoing need to manage the risks of inadvertently receiving or providing state aid.

If a university carries out an economic activity e.g. it rents equipment to businesses or it carries out contract research, the funding of those activities by the state (or an arm of the state) will usually represent State Aid to the university. However, aid would be exempt from prior notification to the Commission if access to the equipment is open to several users and is granted on a transparent and non-discriminatory basis *and* the fee charged for using the equipment corresponds to the market price or reflects their full costs.

If a university uses state funds or resources to fund or assist an undertaking e.g. it carries out research with or for a business at less than market rate, the undertaking may be a recipient of State Aid. However, it is generally lawful for an undertaking to receive aid not exceeding €200,000 over three fiscal years.

Unlawful aid could lead to the European Commission ordering the beneficiary to repay the aid (and interest). Where the University is the beneficiary, it may be ordered to repay the aid. There is a ten year limitation period on the Commission recovering unlawful aid. Most breaches of the rules come to light because an aggrieved competitor of the beneficiary complains to the Commission.

State Aid Tests

In summary, the following four tests can be used to determine whether there is unlawful State Aid. If the answer to any one of the questions is no, there will be no unlawful State Aid or no Aid at all:

- Is there a transfer of state resources? If there is a transfer, is the transfer to an undertaking?
- Does the aid confer an advantage on the recipient of the aid / the beneficiary?
- Is the aid selective? Does it favour certain undertakings or the production of certain goods?
- Does the aid distort competition (actually or potentially) and does the aid affect trade between Member States?

Risk Management Approaches

Guidance is available for the sector – 'State Aid in Research, Development and Innovation – A Guide for Universities' – produced by the Association for University Research and Industry Links (AURIL) is very useful and includes a number of case studies.

From our work to date, which has included benchmarking across institutions and external advice, we suggest the following areas are covered:

- an understating of funding sources and the potential for State Aid. Funding a university's core activities – teaching and non-commercial research – is not State Aid. The fundamental question is whether aid or assistance of some kind is provided by central government, a devolved administration, a regional or local authority, either directly or through an intermediary. The funding need not originate from the Member State's budget – for example, National Lottery funding and European Structural and Investment Funds (ESIF, including the European Regional Development Fund (ERDF) and European Social Fund (ESF)) are treated as a state resource for State Aid purposes. *From our experience, as part of the funding application process for ESIF, institutions are normally asked about their management of State Aid risks and thus can develop or ensure that appropriate processes (and controls) are in place. There may be a higher risk from other sources where there are no funder prompts*
- The De Minimis Regulation – it is generally lawful for an undertaking to receive aid not exceeding €200,000 over three fiscal years. Before granting any de minimis aid, institutions should carry out a due diligence exercise to ensure that the aid (together with any other de minimis aid received by the undertaking) does not exceed this threshold. Accurate records of all de minimis aid awarded must be kept and procedures followed to inform the recipient of the nature of the aid. Given the values involved, this regulation is associated (although not exclusively) with institutional engagement with SMEs. *It is important that institutions keep the necessary records (included signed declarations from the beneficiaries and the maintenance of an up to date de minimis register) – there are obvious advantages of this being undertaken centrally*
- Extent of economic activity – universities can risk relying on the argument that they carry out almost exclusively non-economic activities and that a particular economic activity is purely ancillary and that the economic activities consume exactly the same inputs (labour and fixed costs) as the non-economic activities and that in any year not more than 20% of the activities are economic activities. The economic activity could be assessed as part of, for example, a Faculty's or School's overall activities but the argument could also be used for the use of a building or equipment. *Guidance suggests that there is a risk with this stance (if used). We advise that institutions should assess its validity before deciding whether to use it and should ensure there is on-going monitoring to ensure that the balance of activities remain within the parameters*
- Commercial operations – there are areas of higher risk for institutions and one of those surrounds spin-out companies – for example, if an exclusive licence of patented technology is granted by a university to a spin-out company. The spin-out would be a recipient of State Aid and outside investors in the company will also receive an indirect advantage and State Aid in that the value of the company will be enhanced by the generous licence terms. If the

university had developed the technology from the private sector and no funding from the state, there would be no State Aid. Similarly, rent and equipment charges should be the same for all organisations and no advantage should be given to spin-outs. *In a sector where there is increased pressure to increase income (and income streams) and to aim to ensure that assets are fully utilised, there will need to be a focus on this risk and the tension between ensuring activities remain true to their original purpose and their potential to generate income / additional income*

- Contract research – where a university provides research to an undertaking i.e. carries out contract research, there will usually be no indirect State Aid to the undertaking if the university receives adequate remuneration for its services e.g. the contract research is undertaken at market price. *We have seen institutional costing and pricing strategies and guidance making explicit reference to State Aid. While this is encouraging, adherence to the guidance may still lead to State Aid risks e.g. the university may make a decision to undertake the work below market price (having sought appropriate authorisation in advance)*
- Innovation – there needs to be a balanced approach to the management of State Aid risks – while the right message needs to be communicated about the dangers, it would be a concern if there was an adverse impact on the research and innovation agenda. *This is particularly relevant, for example, in areas of universities that may be encouraged to be more entrepreneurial and commercial in focus e.g. Business Schools. Their activities need not be stifled as long as the there is an understanding (and a framework in place) which highlights and manages the risks.*

How Uniac can Help

We can work with you to understand the risks at your institution and make sensible, practical recommendations – informed by best practice.

To discuss this further, please contact us.

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