



State aid reform update:

European Commission proposes to exempt further categories of aid under the new General Block Exemption Regulation

In our **May 2013 State aid briefing**, we examined proposals by the European Commission (“Commission”) to update the General Block Exemption Regulation (“GBER”), which approves automatically a number of categories of aid. The Commission recently announced proposals to extend the scope of the proposed revised GBER (which will replace the current GBER) to cover a number of further categories of aid. It has also announced that the application of the current GBER will now be extended until 30 June 2014.

In this Briefing, we summarise the additional categories of aid that will in future benefit from the new GBER. We also explain how the transitional arrangements will be applied, which may mean that certain aid measures implemented before the new GBER takes effect can benefit from it, even if those aid measures do not fall within the scope of the existing GBER but will be within the scope of the new GBER.

Should you require any further information on the proposed changes or on any UK or EU competition law matter, please contact your usual contact or one of the members of our Competition Unit.

Additional new categories of aid that will be exempted automatically

Under the EU State aid rules, if financial support provided by a public body to an undertaking constitutes ‘aid’, it cannot be implemented until it has been notified to and approved by the Commission, unless an exemption applies.

The State aid rules apply to a broad range of measures implemented by public bodies that give an economic benefit to one or more specific undertakings. The concepts of ‘aid’, ‘public body’ and ‘undertaking’ are broad:

- aid includes: subsidies, grants, capital injections, soft loans, guarantees, sales of property at an undervalue, compensation for providing certain public services and other transactions on non-market terms

- public bodies include not only central government, but also devolved, regional and local government and other public authorities
- an ‘undertaking’ encompasses any entity carrying on an economic activity, including not only companies, but commercial activities of public authorities and charities.

The GBER applies to a number of categories of aid, provided specified criteria are satisfied; these are different for each category of aid. Aid covered by the GBER does not need to be notified to the Commission and can be implemented immediately.

As explained in our earlier Briefing, the Commission has already proposed extending the scope of the GBER to three new categories of aid, for research infrastructures, district heating and cooling infrastructures, and the remediation of polluted land. It has also proposed revising the criteria applicable to a number of existing categories of aid, including aid for R&D, regional aid, aid to SMEs and environmental aid, which would lead to more aid being exempted under the new GBER.

The Commission is now proposing to extend the GBER to a further seven categories of aid measure which, to the extent that they are aid, can be ‘block exempted’ from the need for notification and prior Commission approval:

- **natural disasters:** compensation to make good material damage directly caused by earthquakes, avalanches, landslides and floods will be exempted for a period of up to four years from the occurrence of the disaster. Aid must be assessed by an independent expert and can be provided both for damage to assets and for loss of income due to a suspension of business activity not exceeding three months. Compensation may be provided for up to 100% of an undertaking’s losses.
- **transport in remote regions:** subsidies of up to 50% of a return ticket can be paid to residents of remote regions

(including islands) for air and sea transport to other airports or ports in the EEA.

- **broadband infrastructure:** investment aid can be provided for investment in passive broadband infrastructure, related civil engineering works, basic broadband networks and high-speed next generation networks, but only in areas where no commercial provision is likely within the next three years. Aid can only be granted after a competitive selection process and open access must be provided to the infrastructure on a non-discriminatory basis. The Commission is proposing a maximum aid threshold of € 70 million per project.
- **innovation clusters:** aid may be provided for the construction or upgrading of innovation clusters, as well as for their operation, up to a threshold of € 5 million. Innovation clusters stimulate innovation through sharing facilities, exchanging knowledge and expertise, and collaboration. Access to the cluster must be provided on a cost-based, open and non-discriminatory basis. Only a proportion of the costs can be met through aid, with a standard 'aid intensity' of 15% of costs, with higher thresholds for SMEs and clusters in assisted areas.
- **process or organisational innovation:** aid of up to € 5 million may be provided for innovation to improve companies' processes and business organisation. Aid to SMEs must not exceed 50% of eligible costs. Aid to large organisations can only be provided if they collaborate with SMEs and it does not exceed 15% of eligible costs.
- **culture and heritage conservation:** aid can be provided for cultural activities (such as museums, art galleries and libraries) and cultural heritage (such as archaeological sites, monuments and historical sites), as well as for intangible heritage, arts events and exhibitions, and the publication of music and literature. However, aid for audio-visual works, film studios or the press is not covered. Both investment aid and operating aid may be provided, subject to thresholds of € 70 million and € 25 million per year, respectively.
- **sports and multifunctional infrastructure:** aid can be provided for the construction and upgrade of sports and other recreational infrastructure, although the Commission is proposing low thresholds: aid must be under € 15 million or total costs must be under € 30 million, with a maximum aid intensity of 75% of eligible costs. Aid can be provided for stadia used for professional sport, provided that a single professional team does not have greater than 80% annual use. Access must be provided on a transparent and non-discriminatory basis, although preferential access may be granted to a club that provides at least 50% of the investment costs.

These additional categories of exempted aid will provide greater legal clarity and should enable many projects that presently require State aid approval to be implemented more quickly, particularly in the fields of innovation, broadband infrastructure and culture and heritage conservation, where many projects are presently notified to the Commission despite clearly not having any appreciable effects on competition (and others are probably not notified at all, despite the obligation to do so). The proposals will also provide greater clarity on public funding of sports stadia, where the Commission has been active in examining public funding of stadia; however, the low financial thresholds are likely to mean that only smaller projects are likely to be covered by the new exemption.

Possible further categories of exempted aid?

The Commission has not included, within the category of cultural aid, aid for audio-visual works, film studios and the press, which are clear economic activities: such aid has often been found to distort competition and will continue to require individual notification and approval. However, once the Commission has revised its guidance on aid to the cinema sector (which is expected shortly), aid for audio-visual works may also be brought within the GBER. In addition, the Commission was also recently given (but has not yet exercised) powers to block exempt certain aid to the fisheries, food and forestry sectors, as well as for other infrastructure, such as ports. The Commission may therefore decide to extend the GBER to some of these sectors at a future date.

Extension of the validity of the existing GBER and transitional arrangements

The existing GBER is due to expire on 31 December 2013. However, the Commission intends to adopt a single new GBER to replace it, combining the two reforms proposed in May and July 2013. To accomplish this, the validity of the existing GBER will be extended until 30 June 2014, when the new GBER will take effect.

The revisions to the GBER may benefit certain aid measures adopted before the new GBER enters into force on 1 July 2014. Under the new GBER's transitional provisions, aid granted before this date that meets its requirements will be exempted, even if it does not fall within the scope of the current GBER.

Burges Salmon Competition Unit

Burges Salmon's Competition Unit is one of the United Kingdom's leading Competition and State aid practices. We undertake the full range of high quality and challenging work. In the State aid field, our lawyers advise public bodies, beneficiaries and third parties on the application of the State aid rules to specific projects, on notification and complaint proceedings before the European Commission and litigation before the EU courts in Luxembourg. This includes the funding of major projects, the rescue and restructuring of companies in difficulty and the provision of aid during the financial crisis. In the competition field, we advise on all aspects of UK and EU competition law including mergers, competition and regulatory investigations, compliance programmes and training, appeals and litigation in the UK and EU courts, procurement and related litigation, and the application of competition law to commercial agreements and strategies.

In 2012, we were awarded *The Lawyer's* "Competition and Regulatory Team of the Year" award for our representation of the Co-operative Group in its successful appeal to

the Competition Appeal Tribunal against the Office of Fair Trading's Competition Act decision in *Tobacco*. We were runner-up for this award for 2013 for our successful defence of a substantial follow-on damages action brought against Cardiff Bus. Our work on these projects was also shortlisted for other awards organised by *Global Competition Review* and *Legal Week*.

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