State Aid in the context of Community Asset Transfer

Summary

Since the tests for State Aid relate to an organisation's activities (and whether or not they are the subject of trade between Member States), we cannot categorically say that State Aid does not apply to all Community Asset Transfers.

However, where an organisation can show that it is carrying out purely local activities, on a 'not for profit' basis, then this should be a good basis for showing there is no State Aid. We anticipate that a lot of bodies hoping to receive community assets would fall into this category.

Where the recipient of a Community Asset Transfer is engaged in carrying out 'not for profit' activities to meet local community need, then the transfer is unlikely to count as State Aid in itself.

Where the activities can be clearly shown to be of local interest only – in the sense that there is no cross-border trade in the activity – then there should be no State Aid either.

However, organisations do need to take care, especially if letting out space to other bodies, to avoid accidental 'leakage' of Aid which inadvertently leads to the other bodies gaining an unfair advantage over their competitors.

What is State Aid?

State Aid is a body of law emanating from the European Union designed to ensure that the single market is not subject to national distortion through State support to particular companies or sectors.

However the law is widely written and therefore doesn't only concern situations where, for example, a State-owned airline gets a big handout from the State that a competitor privately-owned airline isn't entitled to. The law can also potentially apply to third sector organisations (TSOs).

In order for there to be State Aid, within the meaning of Article 107(1) of the Treaty on the functioning of the European Union ("TFEU"), there must be the following:

- aid granted by a Member State or through State resources;
- which favours certain undertakings or the production of certain goods;
- a distortion (or threat of distortion) of competition; and
- an effect on trade between Member States.

All four elements must be present for there to be State Aid.

'Aid' in this context is wider than, for example, just handing over money and includes the State giving up a benefit that it would otherwise be entitled to. 'The State' includes local authorities, and 'State resources' includes land or buildings owned by public bodies such as local authorities. It can also include loans or investment at less than commercial rates or favourable contracts let (at less than market rates) without due consideration of procurement law or principles.

The term 'undertaking' is very widely defined and includes 'not-for-profit' bodies such as charities, industrial and provident societies (IPS) and community interest companies (CICs), as well as other voluntary or community organisations.

For there to be a distortion of competition, or even a potential distortion of it, there first needs to be a competitive market in the goods or services concerned.

For this last test to be satisfied, the Commission (or anyone else investigating potential Aid) must show first that the beneficiary is involved in an economic activity, and second that it operates in a market in which there is trade between Member States. However, the Commission does not have to go so far as proving that the Aid has actually caused a distortion of the market.

Though previously the 'effect on trade' test was interpreted widely as including potential effects on trade as well as actual ones, we understand that the European Courts are now taking a narrower approach and looking for more evidence that an effect on trade is possible in reality, rather than simply accepting theoretical possibilities. In the opinion of a leading barrister specialising in State Aid, recent cases require that an effect on trade is possible and there needs to be evidence to that effect. The 2009 case of Commission v Italian Republic and Wam SPA (C-494/06 P is one example of thinking in this area.

For example, if a community asset is to be used purely for providing 'not for profit' services to the local community, there is likely to be a good basis for saying that there is no cross-border market for such activities and therefore no State Aid. On the other hand, if the community asset were to be used for distribution of goods then (because distribution of goods is a market where there is trade between Member States) it is possible that State Aid might be present. It also might depend where the asset is located.

What is the impact of there being State Aid?

If there is found to be State Aid:

- which is within an exception or exemption, but it has not been properly notified; or
- if there is State Aid and it does not fit within any of the exceptions or exemptions;

then the European Commission can order repayment of the Aid.

Such repayment is the **value** of the Aid **plus interest** from the date of the Aid to the date of repayment. It is therefore important to carefully consider whether or not there is any State Aid and, if so, to deal with it properly.

Some State Aid is permitted in some areas which have agreed exemptions, like the provision of social housing or of training because the amounts involved are deemed to be too small to have any real impact on competition, or because other policy objectives of the EU mean that it is seen as doing more good than harm. Aid that is too small is known as 'de minimis'. The current limit is €200,000 over a rolling period of three years.

Even where State Aid is permitted, it is important to follow the appropriate notification and other requirements relevant to the particular exception or exemption being used.

How does it apply to land?

State Aid can arise in the sale or transfer of land (including buildings) where the owner of the land (being 'the State') does not get full market value for it. In this way the purchaser of the land is getting a benefit that could, at least potentially, distort competition. This is because the purchaser is receiving an advantage (here, paying less) than its competitors.

The European Commission has issued guidance in relation to land transactions involving the State. In order to avoid any risk of there being State Aid, it recommends that the State ensures it is getting the market value for the land in question. This can be determined either by:

- a sufficiently well-publicised, open, and unconditional bidding procedure (comparable to an auction). The best bid will therefore represent market value; or
- an independent expert valuation of the market value by one or more asset valuers.

What about State Aid and Community Asset Transfer?

On the face of things, it looks as though all Community Asset Transfers could count as being State Aid, if the transferee is paying less than the full market value for the building and / or land concerned.

However there is not, so far as we are aware, a competitive market across Europe for bodies providing 'not-for-profit' services to meet the needs of their local communities. Therefore, where a TSO receiving an asset under Community Asset Transfer is carrying out only such activities, there will not be any State Aid, because not all four of the tests for State aid have been met.

Where a recipient TSO does carry out activities that might be the subject of competition across Europe, but which can be shown to be purely local in nature, then again there should be no State Aid. If the activity in question is running a café, then (however good the café is) it is not likely to be a sufficient draw in itself to bring people from Spain or Germany, for example.

Where a recipient TSO does carry out activities that might be the subject of competition across Europe, and which **cannot** be shown to be purely local in nature, then there is the potential for there to be State Aid. However, depending on the scale of such activities, it is quite possible that one of the exceptions or exemptions might apply. In such circumstances, we would recommend seeking further advice.

If a TSO which has received an asset is letting out space to other organisations which are engaged (or potentially engaged) in activities which are the subject of competition between Member States, then it is important that a commercial rent is charged. This is to ensure that there is no 'leakage' of aid by the community body running the building or other asset transferred. If engaged in a mixture of such activities, we would again recommend seeking further advice. Depending on the circumstances, it may be that in practice, any such leakage would be exempt under the de minimis allowance referred to above.

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