



KTI

Knowledge Transfer Ireland
Where Research & Business Connect

KTI Practical Guide

to State Aid Considerations
in Research, Development
& Innovation for RPOs
and Industry



Foreword

More information about how to work with the research base in Ireland, including information on research, expertise, available intellectual property and funding supports for research, development and innovation can be found at www.knowledgetransferireland.com. The National IP Protocol is hosted on the KTI website <https://www.knowledgetransferireland.com/Reports-Publications/Ireland-s-National-IP-Protocol-2019-.pdf> and further Practical Guides to working with state funded research organisations (including Universities, Technical Universities, Institutes of Technology and other colleges) are available from <https://www.knowledgetransferireland.com/Model-Agreements/Practical-Guides/>.

Disclaimer

This guide is intended for use by Irish research performing organisations (RPOs)¹ and companies working with RPOs. The information provided in this document is not intended to constitute legal, business or other professional advice. It is provided as general information only and is not intended as a substitute for advice from a qualified professional such as a solicitor who is familiar with the facts of any specific circumstances.

This guide has been prepared with due care and attention and great effort has been taken to ensure that the information contained is correct. However, it may not be accurate, current or complete in all respects and, consequently, no representation or warranty is made as to the accuracy, currency or completeness of the information provided.

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¹ Universities, Technical Universities, Institutes of Technology and other colleges & State funded research organisations

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Introduction

This guide aims to give companies and people working in the Irish research base an overview of European Union (EU) rules relating to State aid and how it might impact them when working together. Whilst the guide cannot offer specific advice, it explains the rationale for State aid rules, what the parties may need to look out for and how to approach structuring engagements so that infringement can be avoided. The State aid rules can appear complicated. Rather than going into great detail, this guide focusses on the key areas that need to be considered when a company and a research performing organisation (RPO) are planning a research collaboration, a contracted service, licensing or access to RPO facilities. For those wanting more detail, the guide contains links to further reading.

This Guide to State Aid Considerations in Research, Development & Innovation for RPOs and Industry is part of a range of resources produced by Knowledge Transfer Ireland (KTI) to help simplify the process of industry engagement with the research base. Innovation through research and development (R&D) drives commercial competitiveness and working with the research base can offer significant benefits to companies through access to leading-edge expertise, technology and facilities that the company may not have in house. With a national focus on boosting innovation, these engagements are often supported through state funds, either directly or indirectly. The interactive Find RD&I Funding tool on the KTI website can be used to find out more about the funding supports available for companies to work with the research base. The KTI Practical Guides provide information on how to approach industry-RPO contract negotiation and there are a range of template agreements available to speed up that process.

EU State aid control is an essential component of European competition policy and a necessary safeguard to help ensure that use of state funding and state-funded resources do not distort competition in the European Union. The basic rules are set out at Articles 108 and 109 of the Treaty on the Functioning of the European Union (TFEU) and are supplemented by regulations and guidance from the European Commission (often referred to as the “Commission”). Not all aid is unlawful, but any State aid which has the potential to affect competition and trade within the EU will be unlawful unless the Commission authorises that aid (either specifically or through an exemption) or decides not to raise any objection to it. However, there are exceptions. The Commission appreciates that some aid is beneficial to the economy (especially where there is market failure) or may support EU objectives and so has created some exemptions and frameworks that enable certain activities to be undertaken in ways that are not viewed as infringing State aid rules.

It is important to have an awareness of what is and what is not possible under State aid rules as RPOs run the risk of falling foul of State aid if their interactions with companies are carried out without due regard to its restrictions. When RPOs act appropriately and in accordance with the rules in accounting for State aid this is, in effect, helpful to their industry partners - since a breach could require those industry partners to repay unlawful aid and interest on top of this. Conversely, an appreciation of what is permissible under State aid rules is helpful for negotiation of arrangements for interaction between RPOs and industry and can help mitigate overly conservative or risk averse approaches.

The guide covers State aid rules in R,D&I what to watch out for, how to structure research collaboration, issues involved in accessing facilities and equipment within RPOs. It offers a decision tree to assist in determining whether State aid may arise. The guide also mentions the design of funding programmes and exemptions permissible by the Commission.

This Guide is useful if you work in:

- An undertaking (which is EU terminology for a business)² engaged with (or planning to engage with) an Irish RPO in R&D, innovation or other commercial activities, including the use of facilities and equipment
- An RPO in Ireland and you are involved in research and development, innovation, commercial activities or engage with an industry partner or other undertaking.

The Guide should be read in conjunction with the National IP Protocol 2019³.

In preparing this Guide, KTI was supported by Ronan Daly Jermyn Solicitors (www.rdj.ie).

²EU competition law uses the term “undertaking” to refer to any person or entity engaged in economic activity (i.e. offering of goods, services or capital onto the market) regardless of their legal form, status or funding. This term can include companies, businesses, not-for-profit organisation or publicly funded entities engaging in economic activity.
³<https://www.knowledgetransferireland.com/Reports-Publications/Ireland-s-National-IP-Protocol-2019-.pdf>

Executive Summary

By being familiar with the State aid rules and structuring RPO-industry arrangements accordingly, state funding and resources can be used in a way which can benefit undertakings and RPOs and, in turn, support national objectives to drive innovation through R&D.

State aid rules are designed to ensure a level playing field for competition throughout the EU. By structuring RPO-industry interactions in the right way, it is possible to avoid infringing these rules.

At a national level the government may provide funding in a way that is an approved State aid and will interact directly with the Commission on this. This will be reflected in the way in which a funding programme is then structured. At an EU level, funding that is provided directly to undertakings by the EU (e.g. Horizon 2020) is not considered to be State aid as the individual Member State is not part of the decision-making process for distribution of those funds.

Some national funding programmes have been designed with State aid rules in mind and will provide a proportion of state funding directly to undertakings up to a certain permissible level depending on the type of R&D to be undertaken. Essentially this avails of the *General Block Exemption Regulation (GBER)* and the *De Minimis Regulation*. This is not covered in detail in this guide, which is directed towards what RPOs and industry partners need to understand when planning their interactions.

When industry partners and RPOs intend to work together, it is important to consider the issues of direct State aid and indirect State aid. Direct funding from the State (including from a state agency or state funding body) may be awarded to the industry partner or to an RPO. Where this funding goes directly to the industry partner, the awarding body will have designed the programme to avoid conflict with the State aid rules. Where funding is for an RPO's core activities (teaching and research) this is not considered to be State aid because it is not funding for economic activities. Where the funding to the RPO is used to support economic activities (i.e. offering goods or services onto the market which could similarly be offered by a private entity) then this may contravene State aid rules unless the economic activity is purely ancillary to the main non-economic activity that is being funded and is limited in scope, or unless the RPO is simply acting as an intermediary for passing on the totality of the funding to the final recipients.

Indirect State aid occurs when the RPO permits an undertaking to avail of funding or resources provided to the RPO by the State and hence confers a benefit to that undertaking. Again, infringement of the rules can be avoided if the interaction is structured in the right way. In summary, RPOs should charge undertakings the market price for contract research, consultancy services, use of facilities and/or equipment and transfer of intellectual property rights (IPR). Collaborative research projects between an RPO and an industry partner should be structured as effective collaboration.

Record keeping is essential. To demonstrate that market rates have been applied and that there has been an arm's length negotiation, RPOs should keep records of how they reached the final terms for a licence or assignment of IPR and their costs in undertaking contract research, research services, consultancy services or collaborative research. The RPO will need to keep separate accounts for economic and non-economic activities at the level of the RPO and at the level of the individual entities within the RPO where the activity is being carried out to show that the balance of economic and non-economic activity is in line with State aid rules and there is no cross-subsidisation of economic activities by publicly-funded non-economic activities.

These topics are explained further in this guide.

State Aid in Summary

State aid is the use of state funding or state funded resources to support businesses or other organisations (referred to in the State aid rules as undertakings). This public aid need not necessarily entail a cash transaction.

Undertaking: the decisive factor in determining whether an entity is an undertaking is not the nature of the entity itself, but the nature of what it does. If it carries out an economic activity, selling goods or services on a market, it is an undertaking. Publicly funded institutions including RPOs can therefore be undertakings for the purposes of State aid.

The State Aid rules

The expression “the State aid rules” is short-hand for the provisions of the TFEU governing State aid as well as the regulations, notices, communications, frameworks and guidelines issued by the Commission⁴.

The Commission appreciates that some aid is beneficial to the economy especially where there is market failure or where it supports EU objectives. It has therefore developed State aid rules which allow the Member States to assist undertakings in a way which avoids giving those undertakings an advantage to the detriment of competition and trade between Member States.

The State aid rules which RPOs and undertakings working with them are most likely to find useful are:

- the Research and Development and Innovation (the R&D&I) Framework;
- the *De Minimis Regulation*; and
- the General Block Exemption (the GBER);

Each of these is looked at in more detail in this Guide.

When is State Aid unlawful?

The rules relating to State aid ensure that there is fair and open competition within the EU without Member States subsidising undertakings unfairly. Not all State aid is unlawful, but any State aid which has an anti-competitive effect within the EU will be unlawful unless the Commission authorises that aid (either specifically or through an exemption) or decides not to raise any objection to it. Exemptions are an important tool used to facilitate and encourage investment in research, development and innovation, leading to economic growth.

In the absence of an exemption, State aid will be unlawful if it involves a transfer of state funding and/or state resources (or access to those resources) which is selective and confers an advantage on an undertaking which threatens to distort competition and has an effect (actual or potential) on trade between EU Member States. In almost all cases of selective aid, competition will be distorted, and there will be an effect on inter-state trade. In the case of research and development, trade within the EU is likely to be affected due to the internationally tradable nature of R&D. There is no requirement to show an actual effect, just a potential effect.

⁴State Aid rules currently in force can be found at: http://ec.europa.eu/competition/state_aid/modernisation/index_en.html

State resources: Resources which are provided by or through the government of a Member State, or an arm of the government (e.g. a public body such as SFI or Enterprise Ireland), either directly or through an intermediary (e.g. an RPO). A transfer of resources to an undertaking will happen where money is paid, a resource is provided, or an economic benefit is conferred.

Selective Aid: Aid is selective if only certain undertakings, sectors or regions benefit from it. Aid which is available to all undertakings wanting to take it up is not selective.

Advantage: An advantage is an economic benefit which the undertaking would not have received in the normal course of events. A transaction which is on terms more favourable than normal market terms will confer an advantage.

Notification to the Commission

Unless covered by an exemption from notification, any proposed State aid must be notified to the Commission for assessment. If aid is not exempt from notification and it is given before it has been notified to and approved by the Commission (or deemed approved by the Commission by not having raised any objection within the requisite time period), it will be unlawful aid. In respect of specific funding programmes, notification will usually be undertaken by the relevant government department.

The National IP Protocol

The National IP Protocol⁵ sets out the Government's policies to encourage industry, from start-ups and small and medium enterprises to multinational corporations, entrepreneurs and investors to benefit from publicly-funded research. It describes how to access the research and development and expertise carried out in Ireland's RPOs and describes the practical arrangements for this to happen. The National IP Protocol also sets expectations – on RPOs and on parties wishing to engage with RPOs.

The Protocol is consistent with State aid guidelines. It describes how arrangements for contract and collaborative research should be approached and how resulting intellectual property rights (IPR) should be managed and licensed. It discusses the considerations in licensing IPR that arises from state funded research to existing companies and to new spin-out companies.

The Protocol is complemented by a suite of Model Agreements and associated Practical Guides which can be used as a starting point for drafting and negotiating the contracts that underpin commercial arrangements between industry, entrepreneurs, investors and the research base.

⁵ <https://www.knowledgetransferireland.com/Reports-Publications/Ireland-s-National-IP-Protocol-2019-.pdf>

RPOs and State Aid: Non-Economic and Economic Activities

In the context of R,D&I, state funding will usually be provided as direct funding or through resources, or access to resources, from agencies and funding bodies such as (but not limited to) Enterprise Ireland (EI), Higher Education Authority (HEA), Irish Research Council (IRC), Science Foundation Ireland (SFI). If the funding or resources do not come from the state or an arm of the state (e.g. if a research laboratory is funded entirely by a private research foundation), State aid rules do not apply.

Non-economic activities

The Commission regards state funding of an RPO's core activities - teaching and non-commercial research - to be non-economic and therefore not State aid. These activities are described in more detail as:

- (i) the RPO's primary activities, for example:
 - a. education for better and more skilled human resources;
 - b. independent R&D (including collaborative R&D) for more knowledge and better understanding where the RPO engages in **effective collaboration** ([see section on Collaborative Research, later](#)); and
 - c. the wide dissemination of the results of research on a non-exclusive and non-discriminatory basis, e.g. through teaching, open-access databases, open publications or open software; and
- (ii) knowledge exchange, knowledge transfer and technology transfer activities, where those activities are conducted either by the RPO (including its departments or subsidiaries) or jointly with, or on behalf of other such entities, and where all profits from those activities are reinvested in the primary activities of the research organisation or research infrastructure.

Economic activities

Economic activities means offering goods and services on a market.

When an RPO carries out an economic activity, any funding of that activity from State resources will be subject to State aid rules. For example:

- If the RPO carries out an economic activity (e.g. it provides services and facilities such as: carrying out contract research or consultancy, renting equipment or lab space or other services) funded by, or using resources funded by, the state or an arm of the state, the RPO will usually be a recipient of State aid. This is considered as direct State aid⁶ to the RPO.

⁶Direct and indirect State Aid is considered further in the next section

- If the RPO uses state funding or resources (including funds received by it for the purpose of carrying out its core activities) to fund or assist an undertaking (e.g. it carries research with or for an undertaking or provides access to research facilities or equipment at less than a market price), the undertaking may be a recipient of State aid. This is considered as indirect State aid, via the RPO.

Accounting considerations

To satisfy the conditions under which R,D&I activity may be considered not to infringe State aid rules it is important that RPOs keep their economic activities separate from their non-economic activities to ensure that they can demonstrate that their non-economic or primary activities are not subsidising their economic activities.

That may be done by:

- keeping separate accounts sufficient to demonstrate this “accounting separation”;
or
- channelling economic activities through a subsidiary company which the RPO uses to carry out commercial research or to carry out other trading activities.

Failure to maintain such accounting separation could result in the funding of non-economic activities falling under State aid rules.

⁶Direct and indirect State Aid is considered further in the next section

The R&D&I Framework

The Framework for State aid for Research, Development and Innovation⁷ (R&D&I Framework) sets out the conditions under which Member States can grant State aid for the purpose of carrying out R&D&I activities. It explains the approach that the European Commission will take to State aid issues when assessing proposed aid for R&D&I activities which is not covered by an exemption. The Framework is also helpful in that it sets out the Commission's thinking on State aid and how it relates to RPOs and explains how collaborative research can be structured in such a way to avoid State aid.

The Framework talks in terms of undertakings and of research organisations (such as RPOs, research institutes, technology transfer agencies, innovation intermediaries, research-oriented physical or virtual collaborative entities) and research infrastructures (facilities, resources and related services which are used by the scientific community to conduct research) but, for the sake of simplicity, this Guide simply refers to RPOs.

The R&D&I Framework relates to aid for:

- (i) R&D projects where the aided part of the project is fundamental research, industrial research or experimental development;
- (ii) feasibility studies related to R&D projects;
- (iii) the construction and upgrade of research infrastructures;
- (iv) innovation activities; and
- (v) innovation clusters, which do not come within the General Block Exemption Regulation (GBER).

In describing these situations, the Framework provides an understanding of when State aid needs to be notified to the Commission which, in turn, assists the design of state funding programmes. It is for the state funder (via the relevant government department) to seek notification, where relevant, from the Commission. Unlike the GBER, meeting the conditions set out in the R&D&I Framework does not provide an exemption from notifying the Commission before the aid is granted.

Being aware of the extent of this Framework is helpful in the general understanding of the parameters under which RPOs have freedom to operate.

⁷2014/C 198/01. The full text is available at: http://ec.europa.eu/competition/state_aid/modernisation/rdi_framework_en.pdf.

Direct and Indirect State Aid

The R&D&I Framework distinguishes between two sorts of potential State aid:

- (i) state funding directly to an RPO; and
- (ii) indirect State aid provided to undertakings through an RPO.

Direct State Aid

If an RPO carries out an economic activity, the funding of those activities by the state, or an arm of the state, will usually be State aid to the RPO, but it will not necessarily be unlawful. Where an RPO carries out almost exclusively non-economic activities or where research infrastructure is used almost exclusively for non-economic activities, the economic activity may fall outside State aid rules, so long as it is purely ancillary and limited in scope. This means that the economic activity must:

- correspond to an activity which is directly related to and necessary for the operation of the RPO or research infrastructure; or
- be linked intrinsically to main non-economic activities.

Those criteria are difficult to establish but the Commission has stated that it considers those criteria to be met if:

- the economic activities consume exactly the same inputs (e.g. material, equipment, labour and fixed capital) as the non-economic activities; and
- the capacity allocated each year to the economic activities is not more than 20% of the **“relevant entity’s”** overall annual capacity.

Relevant entity: This relates to the part of the RPO (such as the laboratory, or research institute, or business school, etc.) that is undertaking the specific economic activity, rather than the RPO as a whole. This is because the entity carrying out the activity needs to be specific enough such that “the economic activities consume exactly the same inputs (such as material, equipment, labour and fixed capital) as the non-economic activities” (R&D&I Framework).

The Commission will not consider the RPO itself to be a beneficiary of State aid if the RPO acts only as an intermediary in relation to the funding which:

- passes on all the advantages to the final recipients, e.g. through reduced prices; and
- obtains no further advantage because it has been selected through an open tender procedure or the public funding is available to anyone who satisfies the necessary objective conditions, so that the final recipients may acquire equivalent services from any intermediary who satisfies those conditions.

In those circumstances, State aid analysis is to be undertaken at the level of the final recipient (i.e. the beneficiary of the funding).

Indirect State Aid

There may also be indirect State aid to an undertaking where an undertaking obtains an advantage in the context of an RPO carrying out contract research for it, the undertaking and an RPO carrying out collaborative research or the undertaking gaining access to an RPO's research facilities on favourable terms. In that case the RPO may be considered an awarder of State aid. Consequently, the RPO will aim to structure the arrangement so that it does not constitute State aid e.g. through the price of the project or as an **effective collaboration**, as appropriate.

Effective collaboration: This is where at least two independent parties undertake a project where they pursue a common objective based on the division of labour and jointly define its scope, participate in its design, contribute to its implementation and share its risks, as well as its results. One or several parties may bear the full costs of the project and so relieve other parties of its financial risks.

Contract research

Where an RPO provides contract research (or research services) to an undertaking, there will usually be no indirect State aid to the undertaking if the RPO receives adequate remuneration for its activity. This means that one of the following conditions is met:

- the RPO carries out the contract research at market price; or
- where there is no market price, the RPO carries out the contract research at a price which:
 - reflects the full costs of the service and includes a margin established by reference to those margins commonly applied by undertakings active in the same sector as the service; or
 - is the result of arm's length negotiations where the RPO has negotiated to obtain the maximum economic benefit when the contract was concluded and at least the RPO's marginal costs are covered.

The R&D&I Framework does not define what marginal costs are, however they are generally considered in economic terms to be the additional costs to the RPO for carrying out the activity, whereas fixed costs are those which the RPO has incurred whether or not the project took place.

If the RPO provides a specific service for the first time on behalf of a given undertaking, on a trial basis and during a clearly limited period of time, the Commission will normally consider the price charged to be the market price where that contract research is unique, and it can be shown that there is no market for it.

In respect of contract research, where the ownership of, or access rights to, IPR remain with the RPO, their market value may be deducted from the price payable for the services concerned.

Collaborative research

This should be undertaken as **effective collaboration**. The terms and conditions of the project (in particular contributions to its costs, the sharing of risks and results, the dissemination of results, access to and rules for the allocation of IPR) must be concluded **before the start** of the project. This does not mean that there must be definite agreement on the market value of the resulting IPR and the value of the parties' respective contributions to the project. Indeed, the market value of resulting IPR cannot be priced before it is created. Contract research and the provision of research services are not forms of collaboration.

Where there is effective collaboration carried out jointly by an undertaking and an RPO, there will usually be no indirect State aid to the undertaking if **at least one** of the following conditions is met:

- (i) the undertaking bears the full cost of the project;
- (ii) the results of the collaboration which do not give rise to IPR may be widely disseminated and any IPR resulting from the activities of the RPO is fully allocated to the RPO;
- (iii) any IPR resulting from the project and access rights are allocated between the collaborators to reflect adequately their work packages, contributions and respective interests;
- (iv) the RPO receives compensation equivalent to the market price for the IPR which results from its activities and which is assigned to the undertaking, or to which the undertaking is allocated access rights. The value of any contribution (financial and non-financial) of the undertaking to the costs of the RPO's activities that resulted in the IPR, may be deducted from that compensation.

For the purposes of (i) above, the full cost of a project, as the name suggests, represent the true costs to the RPO of carrying out a particular piece of work. This includes the costing of access to facilities and equipment. RPOs use robust, transparent and consistent methodologies and the universities have a standard approach to this. In all cases it is essential that the RPO includes all costs, including staff time, and that this is recorded within the RPO.

For the purposes of (iv) above, the compensation received by the RPO will be deemed equivalent to the market price if one of four conditions is met for establishing the market price in the context of collaborative research is met (see [Establishing the Market Price](#) below). If none of the conditions in (i) - (iv) above is met, the full value of the contribution of the RPO to the project will be considered an advantage to the undertaking, and the State aid rules will apply.

According to the National IP Protocol, it may be possible to grant a non-exclusive royalty-free licence (NERF) to IPR arising from a collaborative research project where the industry partner contributes at least the minimum payment to the costs of the project. In certain circumstances a NERF may give rise to indirect benefit under State aid and this needs to be assessed on a case by case basis in the context of the specific collaboration.

CASE STUDY

Sharing the cost of a research project



Scenario:

A MedTech company has a potentially exciting new product in development and has been discussing research and development requirements with the RPO's physiology department. The RPO's academic lead believes that the new device might successfully assist in the management of a common and debilitating condition. The RPO's physiology department is part-funded from State resources.

The company needs to undertake additional non-clinical tests required to demonstrate initial effectiveness of the device and the RPO has agreed to carry out these tests on the basis that the science is interesting and it may lead to a contribution to the health and welfare of society.

As part of the negotiation of the contract between the company and the RPO, it has been agreed that the RPO will offer a licence to the company for any RPO-developed IPR and in turn will receive a royalty on future sales should the product ultimately be successfully commercialised by the company and if it has used the RPO IPR.

Comment:

At the outset the RPO needs to consider whether this is collaborative research project or contract research services. The facts that this concerns testing of a device already in development and that the company is driving the scope and design of this project would point towards this being a contract research project as opposed to a collaborative research project.

If the RPO is carrying out contract research for the company, it should charge a market price in order to avoid any incidence of indirect State aid to the company arising from the fact that the RPO's activities are part-funded by the State.

CASE STUDY

A collaborative research project with part funding from a government agency



Scenario:

The RPO's Department of Geology was contacted by a company which provides services to the oil and gas industry. The company develops new software tools to support exploration geology. The company and the RPO jointly developed a proposal for a research project which they wish to work on together and the RPO subsequently led a successful bid for funding for a joint project from a collaborative R&D scheme offered by the relevant government agency.

The RPO was awarded funding directly from the agency, at 75% of the eligible R&D costs for the project and the company funds the remainder of the project itself (cash and in-kind).

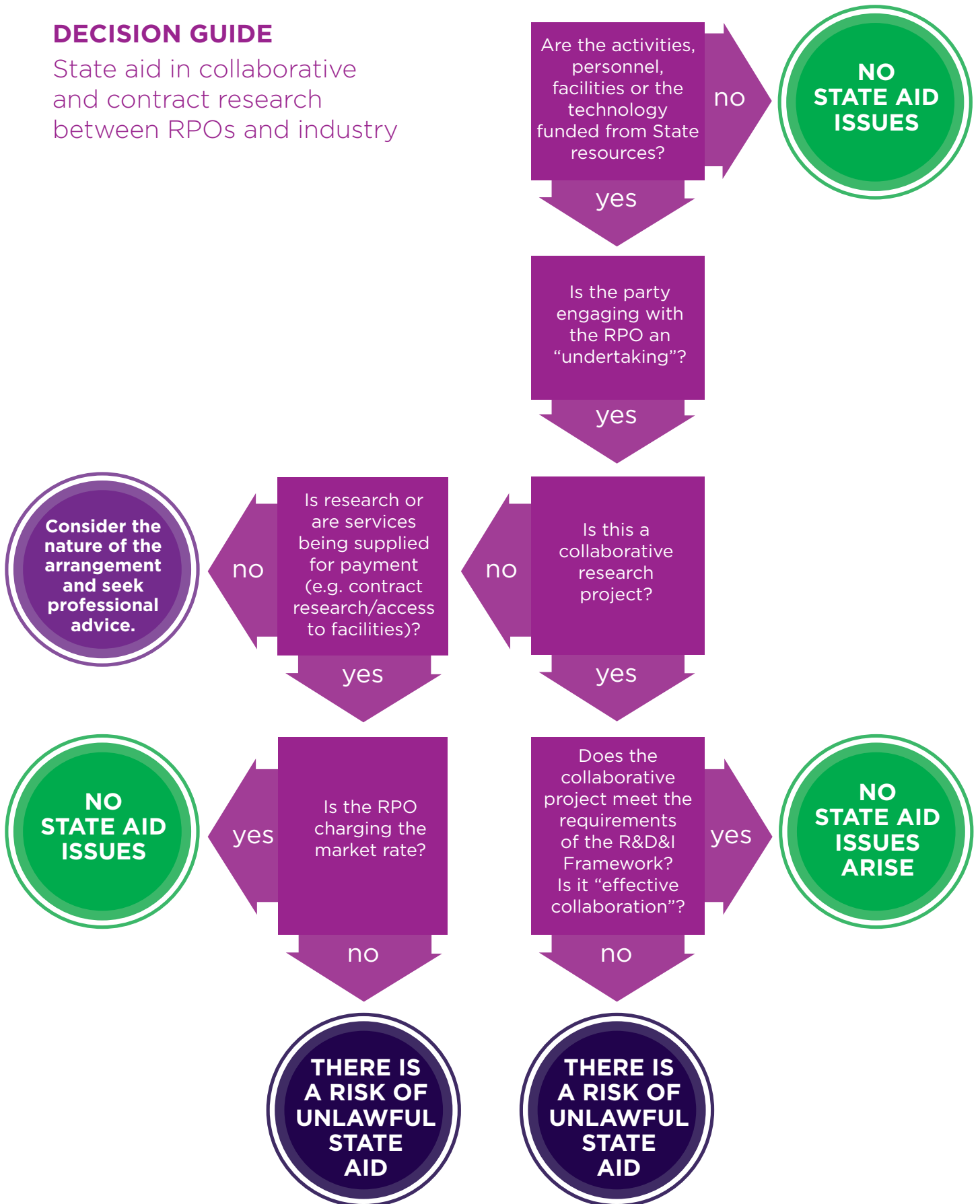
The company is seeking to negotiate ownership of the project results for a defined field subject to payment of a once-off assignment fee capped at the level of its financial contribution to the project.

Comment:

As the company is not paying the full costs of the project and the results of the project giving rise to IPR are not "fully allocated" to the RPO, the parties need to consider whether they can rely on conditions (iii) or (iv) outlined above in the criteria for effective collaboration. From the RPO's perspective, it is difficult to reach a definitive view in relation to (iii) and therefore it would be better placed on insisting that the company pays market price for the results. The proposal to cap the market price at the company's cash contribution could be problematic if the cap proves to be less than the market price. It is also worth noting that the National IP Protocol does not encourage assignment of IPR where there is state funding preferring that the industry partner can obtain rights to the IPR by way of a fee-bearing licence – which may be exclusive.

DECISION GUIDE

State aid in collaborative and contract research between RPOs and industry



Use of infrastructure

Where RPO infrastructure, such as facilities or equipment, has been funded by the State for non-economic use then, to avoid State aid issues, economic use (such as commercial access) should not exceed more than 20% of its capacity. Access should be also be charged at market price to avoid any indirect State aid. Where the funding of the facility or equipment for economic use (e.g. innovation cluster or research infrastructure) has been exempted under the General Block Exemption Regulation (GBER) ([see Exemptions below](#)) access must be charged at market rates and be open to several users on transparent and non-discriminatory basis (with a proviso that preferential access may be given to users who have contributed towards not less than 10% of the investment costs) . If infrastructure is used as part of a collaborative research project, access needs to be structured in such a way as to comply with the rules for effective collaboration and the use should be documented.

CASE STUDY

Establishing a research infrastructure for shared use

**Scenario:**

The RPO is awarded a government grant for €2million to provide supercomputing facilities which will be available to the RPO and to external users, including companies, for the support of research projects. The RPO carries out a full EU tendering process and awards a contract to a supplier, which undertakes the installation and commissioning of the equipment.

Comment:

We need to consider:

- The supplier of the equipment as a recipient of State aid
- The RPO as a recipient of State aid in the form of the government grant; and
- Any undertakings which use the facilities as potential indirect recipients of State aid

The supplier

As the supplier was selected following a full tender process, it will not be paid more than the market price for the equipment and associated services and will not be a recipient of State aid.

The RPO

The RPO will operate the facility in pursuit of its primary purpose activity (teaching & research), and results will be widely disseminated. The RPO will not be a recipient of State aid in the form of the government grant.

If the RPO allows undertakings to use the facilities, the RPO will be carrying out an economic activity (renting out/access to the facility) which has been funded by the state. There will be an element of State aid to the RPO unless the facilities are used almost exclusively for non-economic activities and any economic activity is purely ancillary (i.e. they consume exactly the same equipment, labour and fixed capital) as the non-economic activity and the capacity allocated each year to the economic activities is not more than 20% of the facility's overall capacity. The RPO will also need to maintain accounting separation for the economic and non-economic activities of this facility.

Undertakings

If an undertaking uses the facilities and pays the market price there will be no State aid. Alternatively, there will be no State aid if the undertaking's access takes place with the in context of and the use is limited to the scope of a collaborative research project and the terms of that collaborative research project meet the conditions for avoiding indirect State aid as outlined at [Collaborative Research](#) above.

Establishing the market price

Because a transaction carried out on a commercial basis does not constitute State aid, establishing the market price for any goods or services can be very important if later there is a complaint that the State aid rules have been breached.

Case Law

The Commission was asked, by a competitor company, to look at a software licence agreement between the Dutch Technische Universiteit Delft (TUD) and the company Delftship BV (DS). The software had been developed by an engineer and a TUD lecturer who left the RPO and founded DS. TUD did not have the means to continue developing that software. TUD granted DS an exclusive licence under which DS would develop the software, supply TUD with updates free of charge and pay TUD an annual royalty of 5% of the annual turnover received by DS from the sub-licensing of the software. The Commission looked at the negotiations between TUD and DS and concluded that because TUD had managed to improve its contractual position and had taken several factors into consideration (importantly because of the experience of the engineer who developed the software, DS was best qualified to continue developing the software and to adapt it to TUD's needs), the 5% royalty was a market rate. That was the case even though the market price had not been established by going out to tender or valuation by an independent expert.

Note: the 5% was considered the market rate in the particular circumstances of the case and the market rate will vary from case to case.

Contract research/Research services

When goods and services are bought in by an RPO, the market price is usually established by competitive tender using a fair and open procedure, and in accordance with the applicable public procurement regulations where they apply. When an RPO provides services or facilities, unless in response to a competitive tender, the RPO should, wherever possible, find out using information in the public domain, what the market price is for the provision of similar services or facilities and ensure that it does not charge less than that; however, the absence of a tender procedure and an expert evaluation will not automatically mean that there is State aid.

As noted above, if the market price cannot be established there are alternatives to avoiding indirect State aid and if the RPO provides a specific service for the first time on behalf of a given undertaking, on a trial basis and during a clearly limited period of time, the Commission will normally consider the price charged to be the market price where that contract research is unique, and it can be shown that there is no market for it.

Collaborative research

In the context of collaborative research, the Commission deems the compensation received by the RPO by an undertaking to be the equivalent of the market price if **one** of the following conditions is met:

- (i) the amount of the compensation has been established by means of an open, transparent and non-discriminatory competitive sale procedure; or
- (ii) an independent expert valuation confirms that the amount of the compensation is at least equal to the market price; or
- (iii) the RPO can demonstrate that it effectively negotiated the compensation, at arm's length, to obtain the maximum economic benefit when the contract was concluded, while considering its statutory objectives; or
- (iv) if the collaboration agreement gives the undertaking a right of first refusal in relation to IPR generated by the RPO, the RPO exercises a reciprocal right to solicit more economically advantageous offers from third parties so that the undertaking has to match its offer accordingly. (In practice, putting this into effect could be challenging.)

CASE STUDY

RPO providing consultancy advice to companies



Scenario:

A university's Business School has established a programme to advise companies on lean thinking methodologies.

The programme is actively marketed by the university and involves academics providing advice to a number of different companies and providing them with a report analysing their production processes. The programme does not constitute research and will not generate new knowledge. However, it will demonstrate the real-world utility ('impact') of the university's research and will provide the university with useful case studies to support its research and innovation activities.

Comment:

There is a possibility of both the university and the company being recipients of State aid.

Aid to the university:

In providing consultancy services, the university is engaging in an economic activity. Whilst there is no direct government funding for this programme, as a state funded university, care needs to be taken to ensure that the consultancy programme is ancillary to the non-economic activities of the Business School and does not exceed more than 20% of its capacity and main accounting separation between this service and the general non-economic activities of the Business School.

Aid to the companies:

The company client will receive an advantage (and therefore State aid) through the university report analysing their production processes and the university should therefore charge a market price.

A note on RPO spin-outs

To avoid a spin-out company and other investors being recipients of State aid, if an RPO is licensing IPR to a spin-out company the terms of the licence should be no more favourable to the spin-out than they would be were the licence to be granted on an arm's length basis and at a market price. It is not uncommon for spin-out companies to seek an option to assign the licensed IPR in certain circumstances (e.g. raising a certain level of funding or achieving a certain level of net sales.) The terms of any such option, in particular the assignment fee, should be negotiated on an arm's length basis and at a market price to be determined at the time of exercise. If the assignment fee is less than the market value, there is potential for State aid.

Any collaborative or contract research between the RPO and the spin-out should also be undertaken on an arm's length basis and the considerations outlined earlier taken into account.

While it is unusual for an RPO to provide a cash investment in a spin-out company, if an RPO were to invest in a spin-out company, it should be on the same basis as an external investor would invest (*pari-passu*). If a private investor is investing in the spin-out, the RPO should not invest on terms which are less favourable to the RPO than the terms on which the private investor is investing.

CASE STUDY

Licensing IPR to a spin-out company



Scenario:

An exclusive licence of patented technology is granted by the RPO to a spin-out company.

The technology was developed by the Department of Engineering and was funded from a mixture of sources, including government derived research and proof of concept funding.

Comment:

If the licence to the spin-out is provided on terms that are favourable to the company and do not reflect a market price, i.e. no fees or royalties are payable, the spin-out company will be a recipient of State aid.

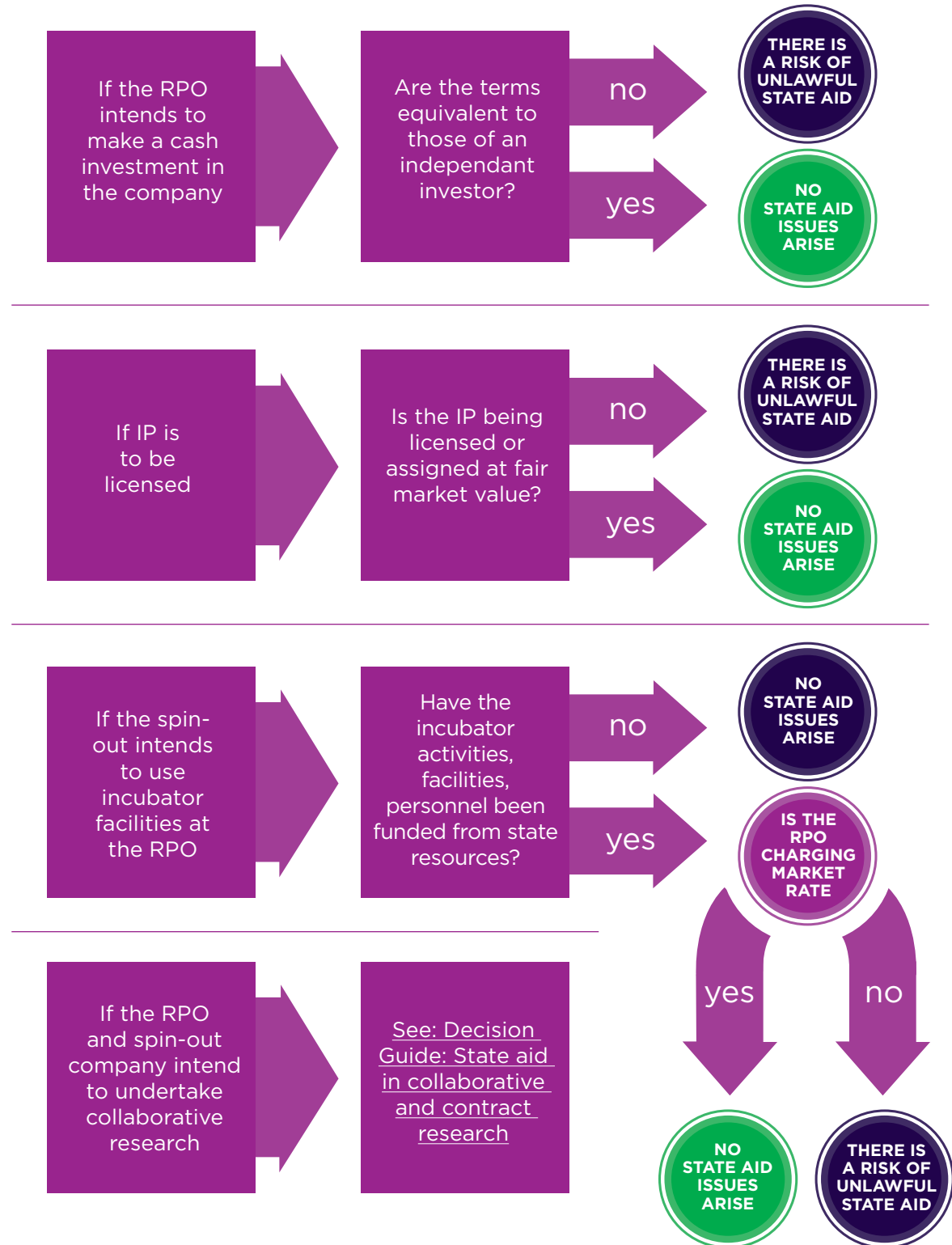
It is unlikely that an independent company which was interested in acquiring the rights to use the technology would be granted a licence on terms which were as favourable as those agreed with the spin-out.

Outside investors in the spin-out 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.

DECISION GUIDE

State aid considerations between RPOs and spin-out companies.

Where the RPO is engaging with a spin-out company the following should be considered:



Academic placements in industry

There are a variety of scenarios and programmes under which researchers may work across the RPO and an industry partner. These range from a short secondment into industry to a full placement and employment by the industry partner. The funding for the placement will usually be jointly between the RPO (through a State funded programme) and the industry party whose contribution may be in cash and/or in kind. State aid issues will have been anticipated by the funding agency at the time of programme design and will take into account the nature of the placement, whether it is solely focussed on skills development or whether it also involves a research project. This will determine how the arrangement is treated. Frequently where research activity is involved, the placement will be handled as an effective collaboration and will need to be structured under the rules for effective collaboration.

CASE STUDY

Programme for in-company R&D training for researchers



Scenario:

A postgraduate researcher has won funding under a state funding agency fellowship programme to spend a period of their time based in an SME undertaking research that is related to their PhD studies. The researcher is seconded to the company from the university with academic supervision through the university. The work to be undertaken by the researcher whilst on placement with the company will be directly related to the researcher's research project. The researcher will be expected to publish the results of their research as part of their PhD thesis and any associated scholarly publications. The funding for the programme is paid directly to the researcher by the funder as a scholarship.

Comment:

Although the researcher is undertaking research within the company environment, this is directly related to their studies and viewed as a training programme.

Care should be taken that the work programme in the company does not underpin a commercially focussed project for the company, in which case the placement might be considered to be the provision of a research service and company might be considered as benefitting from indirect State aid.

The university would typically have an arrangement in place whereby it owned and managed any IPR derived by the researcher under the university IP policy, including its rewards to inventors policy. Care should be taken as to if and how the company benefits under any IPR that the researcher might create whilst working in the company. It may be possible to structure this in line with an effective collaboration and to take into account any contributions (cash and in-kind) made by the company.

Exemptions

A detailed review of the exemptions is beyond the scope of this Guide since there are difficulties for RPOs in seeking to apply these in practice. Where State aid is anticipated this usually needs to be notified to the Commission. Only a Member State can notify an aid instrument to the Commission for approval.

However, there are important exemptions to the need to notify, including the *De Minimis Regulation* which enables a small amount of aid to be given in certain circumstances, and the *General Block Exemption Regulation (GBER)* which allows aid to be provided to meet certain costs (including research and development costs) within financial limits. These exemptions are referenced in this Guide for information purposes only and are only relevant if it is not possible for the funding/project to make use of the flexibility that the R&D&I Framework offers. Furthermore, it is not possible for an RPO to rely on GBER to avoid indirect aid in relation to its arrangements with undertakings due to the requirement for aid to be transparent and the procedural requirements which the State must follow when relying on GBER. It is also inadvisable for RPOs to rely on the *De Minimis Regulation* because RPOs will be unlikely to have visibility over other State funding that the undertaking may have received, and it may also limit that undertaking's ability to access direct State supports from other sources.

De Minimis Aid: It is generally lawful to give aid of up to €200,000 (€100,000 for road transport, €30,000 for fishery and aquaculture) over 3 fiscal years. Before using this exemption, there should be a due diligence exercise to ensure that the aid does not cause this threshold to be exceeded. The value of aid provided also needs to be confirmed in writing.

GBER: This makes certain types of aid lawful, without them having to be notified in advance to the Commission. There are 13 categories of permitted aid, each with its own conditions and financial limits. The Commission must be notified within 20 days of a grant of aid under the GBER unless the aid is granted under a GBER scheme (and the latter is usually the case).

The State Aid Tests

The following four tests are used to determine whether there is unlawful State aid. If the answer to any one or more of those questions is no, there will be no unlawful State aid (and in some cases there will be no aid at all).

Test 1: Is there a transfer of state resources to an undertaking?

This test is in two parts:

(i) Is there a transfer of state resources?

State funding or resources are provided by, or through, the government of a Member State, or an arm of the government, either directly or through an intermediary.

A transfer of resources (aid, assistance or support) may take many forms. The most obvious is making a grant, but it also includes: the sale or licensing of land or another asset (including intellectual property); buying-in goods or services; the provision of facilities (such as laboratory space and equipment) or services (such as consultancy or research services); the making of loans; and investment in a business where, in each case, an advantage is conferred. (See *Test 2* below.)

In many cases the aid may not be granted directly by a Member State. Instead it may be granted through an arm of the state (for instance through a funding agency etc.) or an intermediary (e.g. an RPO) or it may be indirect aid (for instance, a company with which an RPO is carrying out a research project may benefit indirectly from the intellectual property rights which have been created by the RPO using state funding).

The funding need not originate from the Member State's budget. Funding which is allocated by the state, either directly or through an intermediary, is a state resource. For example, European Structural and Investment Funds (ESIF, including the European Regional Development Fund (ERDF) and the European Social Fund (ESF)) are treated as a state resource for State aid purposes because a Member State ultimately controls how that funding is used. ESIFs are managed by Member States and are considered to be state resources. Therefore, any funds provided by the state and any ESIF monies must be added together when determining the total amount of funding transferred from state resources to an undertaking.

Funding through the Commission's current Horizon 2020 programme (and its successor, Horizon Europe) is managed at European level and thus awards under these programmes are not considered a State aid.

(ii) If there is a transfer, is the transfer to an undertaking?

The decisive factor in determining whether an entity is an undertaking is not the nature of the entity itself, but the nature of what it does (i.e. usually the activities being funded). An undertaking is any entity, regardless of its legal status and the way in which it is financed, which is engaged in an economic activity, i.e. an activity consisting of offering goods and services on a given market (It does not matter whether a profit is actually made.) For the purposes of State aid, an undertaking may be a private body, company, partnership, sole trader, co-operative, trade association, voluntary organisation, charity, RPO, research organisation, social enterprise, not-for-profit organisation, or even a public body or government department, when it is engaged in an economic activity.

Some entities carry out both economic and non-economic activities. RPOs are prime examples of this ([see the section on “RPOs and State aid – Economic and Non-Economic Activities”](#) above), and they will be treated as undertakings when they carry out economic activities. Any public subsidy or support for their economic activities or any use by them of publicly-funded resources (e.g. research labs) to support any economic activity may be State aid.

Some activities are designated as non-economic by the Commission, even though they happen under market-like conditions. When carrying out these activities, the entity will not be an undertaking.

Test 2: Does the aid confer an advantage on the recipient of the aid/the beneficiary?

An advantage is an economic benefit which the undertaking would not have received in the normal course of business, e.g. it is conferred for free or on terms which are better than normal commercial terms.

A transaction which is on terms more favourable than normal market terms will confer an advantage. The sale or licensing of an asset at less than the market value or rate, buying-in goods or services at more than their market value, the provision of facilities (such as laboratory facilities and equipment), or services (such as consultancy or research services) for free or below the market price, the making of a loan at a low interest rate, and investment in a company on terms which a private investor operating under normal market economy conditions would not accept, may all confer an economic advantage.

A transaction on normal market terms will not confer an advantage. Purchasing or supplying goods and services at the full market rate or price or investing in a company on terms which a private investor operating under normal market economy conditions would accept does not confer an economic advantage. A cornerstone of State aid is that there will be no State aid where the benefit is conferred on terms which an independent private operator, operating in a market economy, would have accepted. This is called the market economy operator principle, MEOP (or sometimes the market economy investor principle, MEIP). If an RPO seeks to rely on this principle it is important to have benchmarks in order to demonstrate that the institution was acting in the same way as a private operator would in the same circumstances.

Test 3: Is the Aid selective? Does it favour certain undertakings or the production of certain goods?

Aid is selective if only certain companies, sectors, regions or types of undertaking (such as participants in a research project) benefit from it. For example, aid which is granted only to a particular sector, or only to SMEs or only to undertakings in one region will be selective. An aid scheme is selective if the organisation which administers it has some degree of discretion in assessing and awarding grants. Aid which is available to all companies wanting to take it up is not selective.

Test 4: Does the aid distort competition (actually or potentially) and does the aid affect trade between Member States?

This test is in two parts:

(i) Is there actual or potential distortion of competition?

Competition is distorted if the aid strengthens the competitive position of the beneficiary or recipient of the aid in relation to its competitors. The Commission takes the view that most aid distorts, or potentially distorts, competition and the onus is on the Member State to prove there is no distortion. The beneficiary's share of the market and the size of the distortion are irrelevant and the status of the beneficiary is irrelevant if it is engaged in an economic activity. Potential, as well as actual, distortion of competition is captured, so the test applies if a market could emerge, even if there is no market yet.

(ii) Does the aid affect trade between EU Member States?

It is sufficient to affect trade between Member States if the beneficiary is involved in an economic activity and operates in a market in which there is trade between Member States. Most products and services are traded between Member States. Therefore, aid for any business or economic activity may affect, or be capable of affecting, trade between Member States. This applies even if the beneficiary does not actually trade with other Member States. The market share of the beneficiary and the effect of the aid are irrelevant to this question.

Consequences of Ignoring or Breaching State Aid Rules

The Commission's aim is to ensure that there is less and better targeted State aid. It therefore takes a strict approach to unlawful and incompatible State aid.

The consequences of unlawful State aid can be very serious: both the Commission and the Irish courts have the power to order the beneficiary to repay the aid and to pay interest. The Commission will review at the level of the Member State and will order recovery if it determines the aid was unlawful. The Member State, in turn, will pursue the beneficiary.

- Where the RPO is the beneficiary, the RPO may be ordered to repay the aid.
- Where the industry partner is the beneficiary, the industry partner may be ordered to repay the aid.

Where an RPO is administering disbursement of grant funding for collaborative projects (e.g. as lead on a project grant with other RPOs), there will often be a condition that the RPO takes responsibility for ensuring that there is no unlawful aid to third parties, and the RPO may be liable to pay compensation if the unlawful aid cannot be recovered from a third party or if (for example) proper records have not been kept by the RPO.

There is a 10-year limitation period on the Commission recovering unlawful aid, i.e. the aid cannot be recovered by the Commission after 10 years has elapsed. The clock starts on the day on which the aid is awarded to the beneficiary. If any action is taken regarding the unlawful aid by the Commission (or by a Member State acting at the request of the Commission), that 10-year period is interrupted and starts afresh, hence the limitation period can often be longer than 10 years.

The Commission can also impose fines (not greater than 1% of turnover) on an undertaking if, intentionally or through gross negligence, it provides incorrect, incomplete or misleading information to the Commission in connection with a State aid investigation.

Most breaches of the State aid rules come to light because an aggrieved competitor of the beneficiary complains to the Commission.

Practical Tips

- 1.** Market price should be charged for:
 - ✓ Contract research
 - ✓ Consultancy services
 - ✓ Access to facilities and/or equipment
 - ✓ Licensing of intellectual property rights (IPR)
 - Derived from a collaboration with a company
 - Derived independently by the RPO
- 2.** To demonstrate that market price has been applied and that there has been an arm's length negotiation, RPOs should keep records of how they reached the final terms.
- 3.** Collaborative research projects between an RPO and a company (or companies) should be structured as effective collaboration and agreements must be put in place in advance of the project commencing.
- 4.** Pricing of research should take into account the full costs of research, including staff time dedicated to the project. In the case of contract research, a margin should also be applied.
- 5.** Maintain accounting separation between economic and non-economic activities. Consider use of separate legal entities if appropriate.
- 6.** To demonstrate the balance of economic and non-economic activity is in line with State aid rules, RPOs should keep separate accounts for these activities at the level of the RPO and at the level of the individual entities within the RPO where the activity is being carried out e.g. by School, Department, Facility.

Appendices

Appendix 1: Glossary

Advantage: An advantage is an economic benefit which the undertaking would not have received in the normal course of things. A transaction which is on terms more favourable than normal market terms will confer an advantage.

Economic activities: This means offering goods and services on a given market which could be carried out by a private operator in order to make a profit.

Effective collaboration: This is where at least two independent parties undertake a project where they pursue a common objective based on the division of labour and jointly define its scope, participate in its design, contribute to its implementation and share its risks, as well as its results. One or several parties may bear the full costs of the project and so relieve other parties of its financial risks. Contract research and the provision of research services are not forms of collaboration.

De Minimis Aid: It is generally lawful to give aid of up to €200,000 (€100,000 for road transport, €30,000 for fishery and aquaculture) over 3 fiscal years. Before using this exemption, there should be a due diligence exercise to ensure that the aid does not cause this threshold to be exceeded. The value of aid provided also needs to be confirmed in writing.

GBER: This makes certain types of aid lawful, without them having to be notified in advance to the Commission. There are 13 categories of permitted aid, each with its own conditions and financial limits. The Commission must be notified within 20 days of a grant of aid under the GBER unless the aid is granted under a GBER scheme (and the latter is usually the case).

Selective Aid: Aid is selective if only certain companies, sectors or regions benefit from it. Aid which is available to all companies wanting to take it up is not selective.

State resources: Resources which are provided by or through the government of a Member State, or an arm of the government (e.g. a public body such as SFI or Enterprise Ireland), either directly or through an intermediary (e.g. an RPO). A transfer of resources to an undertaking will happen where money is paid, a resource is provided, or an economic benefit is conferred.

Relevant entity: This relates to the part of the RPO (such as the laboratory, or research institute, or business school, etc.) that is undertaking the specific economic activity, rather than the RPO as a whole. This is because the entity carrying out the activity needs to be specific enough such that “the economic activities consume exactly the same inputs (such as material, equipment, labour and fixed capital) as the non-economic activities” (R&D&I Framework).

Undertaking: Any type of entity that carries out an economic activity, selling goods or services on a market.

Appendix 2: Further reading

European Commission publications

EC overview of State aid

http://ec.europa.eu/competition/state_aid/overview/index_en.html

State aid rules

All the State aid rules currently in force can be found at:

http://ec.europa.eu/competition/state_aid/modernisation/index_en.html

EC R&D&I Framework – the Framework for State aid for research and development and innovation (2014/C 198/01)

[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0627\(01\)&from=EL](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0627(01)&from=EL)

De minimis regulation

Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid: http://ec.europa.eu/competition/state_aid/legislation/de_minimis_regulation_en.pdf

General Block Exemption Regulation (GBER)

Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0651&from=EN>

Irish publications

Department of Business, Enterprise and Innovation (DBEI) summary of State aid

<https://dbei.gov.ie/en/What-We-Do/EU-Internal-Market/EU-State-Aid-Rules/What-is-State-Aid/>

National IP Protocol 2019

<https://www.knowledgetransferireland.com/Reports-Publications/Ireland-s-National-IP-Protocol-2019-.pdf>

Appendix 3: Acknowledgments

We would like to thank the various groups and individuals who commented on the drafting of this guide:

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NOTES

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