

State Aid – Questions and Answers

The following are some commonly-asked questions about State Aid and its applicability to business and community engagement activities.

What is State Aid?

State Aid is the use of public funds, either directly or indirectly, in a way that distorts competition between organisations participating in commercial or “economic” markets (known as “economic undertakings”). Distortion may occur either as a result of an advantage given to one organisation or a disadvantage to another. Unless there are specific mitigating circumstances, it is unlawful.

The definition of State Aid has three criteria: the use of public funds, the existence of an economic market, and the distortion of that market. For State Aid to have arisen all three of these criteria have to be met.

Since Janet is paid for with public funds, and business or community engagement activities may involve both universities and their partners acting as, or competing with, commercial entities, then State Aid issues may arise when using Janet as part of a university’s or college’s business and community engagement activities.

Where can State Aid arise in business and community engagement?

In the context of a university, college or research organisation there are three levels at which competitive markets may exist and therefore where State Aid issues may arise. In each case it is important to consider both the organisations with which the university *does* do business, and those with which it *does not*.

- **suppliers** to the university: for example the award of a contract may give either an advantage to the successful supplier or a disadvantage other potential suppliers, especially if this has been done without adherence to public procurement regulations;
- **competitors** to the university (where the competitor is itself acting as an economic undertaking): if there are other organisations offering the same service as the university, on a commercial basis, then these may not be able to compete fairly if the university uses resources obtained with public funding;
- **customers** of the university: for example a customer may gain an unfair advantage over its competitors as a result of the receipt of publicly-funded services from the university.

It is the latter two levels – competitors and customers – that are primarily of relevance to the use of Janet in business and community engagement. Note though that it is also possible that State Aid to a supplier could take place if, for example, the university offered use of Janet as part of a contract for services in the context of business and community engagement or otherwise. If the contract was procured by open procurement with use of Janet offered to all

bidders on equal terms there is unlikely to be an issue.

Why is State Aid unlawful?

Fair economic competition is generally regarded as beneficial to the public interest by encouraging better and cheaper services. State Aid involves the distortion of that competition, so in principle is prohibited by European Law.

Not all State Aid is unlawful. There are some exemptions (where the State Aid is regarded as lawful, or “compatible”) where it is considered by the Commission to support some other public interest: for example support for regions that are economically disadvantaged or for industry sectors of national significance where the importance is deemed to outweigh the potential for distortion of competition. There is also a *de minimis* exemption (see later). Such exemptions are granted at European level, are often short-term, and are normally subject to strict conditions and reporting requirements.

Although there are exemptions that may in principle be relevant to universities and research organisations, it is unlikely that these will be of practical relevance to the use of Janet in business and community engagement. Two areas relevant to such use where State Aid is considered not to apply are:

State Aid does not normally apply where a university is using public funding to provide its core teaching and research missions. Business and community engagement activities may or may not fall into these categories. It also does not apply if the University is using private funding, provided that this is totally separate from any public funding or any use of its publicly funded resources.

State Aid does not apply if there is no market to distort, for example in an area where there is no existing broadband coverage by the commercial ISP market or foreseen plans for it to be provided. Given the difficulty of proving the absence of a market, further advice is likely to be needed in these cases. In particular, use of public funds to provide support to a communications provider to deliver broadband, even where there is currently no provision, is likely to require explicit approval. (This would apply to the current “Superfast Broadband” initiative, should use of university and/or Janet broadband capacity be considered in support of a particular project under this. The Commission has published *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks* and these would be used in this context.)

Janet would be interested to hear from any university considering use of this latter provision.

How is it determined whether State Aid is unlawful?

The rules governing whether State Aid in any particular circumstance is unlawful have evolved through a combination of decisions made by the European Commission when consulted by national governments (or when it decides to intervene), and case law handed down by the European Court of Justice. The application of the rules is codified in a number Commission Guidelines and Frameworks covering different types of support.

In the UK the Department for Business Innovation and Skills (BIS) is responsible for compliance with State Aid rules. BIS maintains guidance documentation and can be consulted for guidance on specific potential cases. If it determines that the case is not sufficiently

covered by precedent, it may advise that the Commission is formally notified of the case (before aid is granted) so that the latter can advise whether it is lawful or not.

What penalties are there if State Aid is determined to be unlawful?

If the European Commission finds that unlawful State Aid has been provided it will normally order that it stops. They may also require that the unlawful Aid is repaid with interest by the recipient, and the responsible Government department may be fined.

Organisations that have provided or benefitted from the State Aid may therefore find themselves in breach of contract or facing an economic loss if the State Aid is withdrawn or has to be repaid. There is also a potential for reputational damage to the provider of the unlawful State Aid, particularly if it is perceived to have acted without proper diligence.

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