

State Aid - What is it ?

State Aid is the term used in The Treaty on the Functioning of the European Union (TFEU) to refer to the assistance given by member states to “undertakings”. The term “undertakings” is widely construed – the recipient of the aid does not need to trade for profit. What is crucial is the activity carried out and not the legal status of the recipient of the aid.

State Aid is defined, and restricted / prohibited, in Article 107(1) of TFEU in the following, edited, terms: *“any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings ... shall, in so far as it affects trade between Member States, be incompatible with the internal market.”*

However, for Article 107(1) to be applicable five cumulative criteria must be met. If one criterion therefore is not present, then the funding is unlikely to constitute State Aid. The five criteria are:

1. Is the aid by the state or through state resources?

This not only includes Central Government resources, but also regional or local authorities, and public or private sector bodies controlled by the State, charities and universities. Examples include tax exemptions and lottery funding.

2. Does the aid confer an advantage to the recipient of the aid?

The question revolves around the effect of aid to the recipient, not the measure itself or the intention behind it. So grants and soft loans can, potentially, constitute State Aid.

3. Is the aid “selective” or “general”?

State Aid only covers aid which is deemed to be selective; this includes aid for Small to Medium Enterprises and sectors. General aid which affects the nation’s economy as a whole (for example tax exemptions) cannot be State Aid.

4. Would the aid distort or have the potential to distort competition?

If the position of the recipient is strengthened by comparison to its competitors, then the answer is likely to be yes. In addition, the potential to distort competition does not need to be substantial

or significant. It is also recognised that “selective” aid (see 3 above) is always likely to have the potential to distort competition.

5. Is the activity tradable between member states?

Again, this is widely construed and the European Commission (EC) and courts have pronounced that even if there is only one operator in a region it does not mean that there is no impact on trade between member States (“Commission Staff Working Document – Brussels, 7.12.2010 (SEC (2010) 1545 final” refers).

Registered Social Landlords (RSLs) and State Aid

RSLs are “undertakings” for State Aid purposes, so are housing grants State Aid? Generally speaking no, because grants or funding allocated towards “service of general economic interest” (SGEI) are not State Aid - see Article 106 (2) of TFEU. In addition, an EC’s Decision, that came into force on 31 January 2012, confirms that social housing is a SGEI, so RSLs can receive grants which are not State Aid.

However, various criteria must be met in order to comply with the EC’s Decision. In essence, the relevant grant-assisted part of a housing project needs to be quantified to demonstrate that there will be no “overcompensation” (excess payment). If it transpires that there has been overcompensation, then there is a claw back mechanism in place to recoup overpayments. Separate accounts would of course have to be kept for this purpose.

The EC’s Decision is such that SGEI grants do not require prior notification to the EC, and it is up to member states to decide what is and what not a SGEI.

Remarks: One complication of course is that social housing is not defined in the EC’s Decision. This begs the question as to the status of grant-assisted housing projects targeting mid-market rent, full market rent, or indeed outright sales, i.e. whether these projects are considered SGEI.

However, one should also consider further exemptions, for example, financial assistance deemed “de minimis”, meaning financial assistance below such thresholds which act as exemptions to State Aid.

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In this edition

State Aid - What is it?

Five cumulative criteria must be met for funding to constitute State Aid.

What are they?

The New Régime for Registered Social Landlords (RSLs) and Employment Law Issues for RSLs as Employers

A look at the role of the Scottish Housing Regulator.

What has changed?

Watch out for...

What’s on the horizon for the sector?

The new régime for Registered Social Landlords (RSLs) and employment law issues for RSLs as employers



Spotlight Feature

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What the **Scottish Housing Regulator** (SHR) says about itself:

The SHR was established in April 2011 under the Housing (Scotland) Act 2010. It assumed full regulatory responsibilities from April 2012. Its objective is to safeguard and promote the interests of tenants and others who use local authority and RSL housing services. The SHR regulates around 180 RSLs and published its **Regulatory Framework** in February 2012, which details how the SHR will use its powers, and other publications setting out the regulatory requirements for good governance. The term “governance” refers to the arrangements for the leadership, strategic direction and control of an RSL.

The watch words are “*how the SHR will use its powers*” and “*the regulatory requirements for good governance*.” SHR is there, in short, to ensure good governance in the affordable housing sector.

I have acted for many RSL clients over a number of years and whilst all employers, regardless of their sector or the services they provide, are governed by the same UK employment laws, RSLs always had to contend with an extra layer of rules, now contained within the regulatory framework. For those of us old enough to remember, that framework used to be under the auspices of Scottish Homes, then Communities Scotland. The current régime is that of the SHR – Is it simply a change of name or is there more to it?

The new régime is a complete overhaul of what went before and has resulted in new practices, so we are all watching to see how the SHR does actually operate, and use its powers, in practice.

To illustrate the point, I look below at how, in my view, the SHR would expect an RSL to deal with an employee who borrows money from a colleague in the workplace (a personal arrangement between staff) and denies doing so when asked by their employer about that matter.

I dealt with such a case many years ago for an RSL client. I advised the RSL’s management committee then that they could dismiss their employee who worked in the finance department. My view was that although the lending of money was a personal matter and not a work issue, the employee had brought the issue into the workplace when the employee had been advised by the RSL not to do so and had then lied about it when asked by the RSL.

This amounted to a dismissible offence given the expectations of trust, honesty and transparency under the regulatory framework of the then housing regulator, Communities Scotland. I argued, successfully, at the Employment Tribunal, that dismissal of the employee, given the nature of the regulatory régime for RSLs, was an appropriate decision. The Employment Tribunal agreed and threw out the unfair dismissal claim. Such an outcome would not have been possible but for the regulatory framework and my knowledge that those arguments could be successfully made and defended.

Were the same case to arise now under the SHR’s watch, I would issue the same advice as the values underpinning the new régime have not changed - what has changed, however, is what is expected of an RSL who comes across such an issue by a member of staff. Doing nothing is still not an option.

The SHR, under the Regulatory Framework and other publications, sets out Standards, including Standard 4 - the governing body of the RSL must base its decisions on good quality information and advice, identifying and mitigating risks to the organisation’s purpose. It is clear that the SHR expects the governing body to ensure that it receives good quality information and advice from staff and, where necessary, **expert independent advisers’** advice which is timely and appropriate to the RSL’s strategic role and decisions.

In short, the RSL is expected to take good quality advice in order to make appropriate decisions and to demonstrate, and operate under, good governance.

The team at bto does provide expert independent advice to RSLs that is timely and appropriate to the RSL’s strategic role and decisions. If you have not sought advice from bto before, we would be happy to speak with you.

Watch out for...

- Ongoing consultation regarding a new housing panel.
- Housing (Scotland) Bill - RTB or not RTB, that is the question.
- Tribunals (Scotland) Bill — A rationalisation of the legal regime affecting Tribunals throughout Scotland.

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