

Providing Funds for Business and Community Engagement

This publication is aimed at personnel within UK funding bodies and considers the State Aid issues which may arise in the context of business and community engagement activities.

It is one of a series of publications produced by JISC Legal to raise awareness of the potential legal issues related to the use of technology by colleges and universities in relation to their business and community engagement activities.

Please note: this guidance has been prepared by JISC Legal for information purposes only and is not, nor is it intended to be, legal advice. This information is not intended to constitute, and receipt of it does not constitute, a contract for legal advice or the establishment of a solicitor-client relationship.

04 December 2009

Table of Contents

1. Overview	1
2. Introduction	2
3. Is Notification Required?	4
4. Do any Block Exemptions apply?	4
5. Existing Schemes.....	10
6. Notification	11
7. Summary - Providing funds for BCE	13

1. Overview

1.1 This guidance document is intended to assist relevant personnel within the UK funding bodies¹ ("Funding Bodies") when dealing with State Aid issues in the context of Business and Community Engagement ("BCE") activities. It builds upon the JISC Legal Guidance "Competition and State Aid – What is the Law?" and "How to play fair – a User Guide" by providing practical advice specifically for Funding Bodies on their responsibilities under the State Aid rules.

1.2 The State Aid rules are particularly relevant to Funding Bodies. As noted in the preceding Guidance, the respective Funding Councils for England, Scotland, Wales and Northern Ireland would be considered as part of the

¹ This will include the UK Funding and Research Councils, and other public sector or publicly funded bodies which provide institutions with funding.

State for the purposes of Article 87, as would the seven Research Councils.² Also, they manage and distribute Central Government funds which clearly constitute “State resources” for the purposes of the rules.

1.3 Accordingly, Funding Bodies have a responsibility to ensure that public resources are administered in accordance with the State Aid rules - quite simply, such resources may not be used, whether directly or indirectly, to confer an unfair advantage on an undertaking³.

1.4 This Guidance will consider the following areas:

- Block Exemptions (specifically the De Minimis Block Exemption and General Block Exemption Regulation)
- Existing Approved Schemes
- The Notification process

2. Introduction

2.1 The State Aid rules prohibit national governments from providing selective financial assistance or other economic support where such intervention may distort competition and affect trade between Member States.

2.2 Where a Member State proposes to grant any such assistance or support to an undertaking, it has an obligation to notify that measure to the European Commission ("the Commission") for clearance. State Aid which is not notified, or which is granted prior to the Commission's approval, is unlawful.

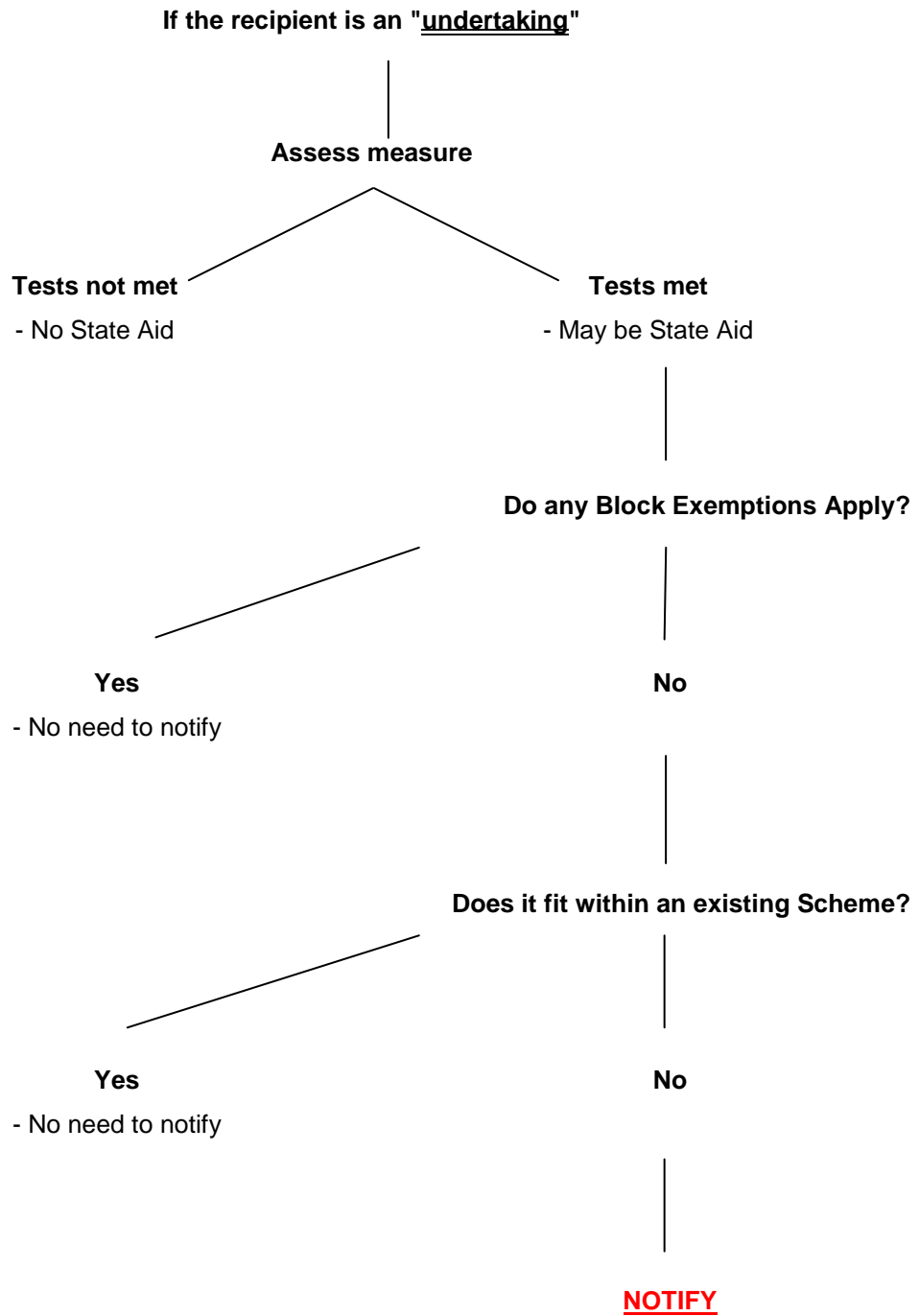
2.3 It is therefore important that Funding Bodies understand when notification is required and, in the context of supporting BCE activities, how to structure proposed measures to alleviate State Aid concerns.

2.4 Whilst each measure is required to be assessed on its own merits, it is possible to follow a general framework to assist with such assessments in the context of BCE activities. The first two stages of the framework were considered in the JISC Legal Guidance "How to play fair – a User Guide". This Guidance document will consider the remainder of the framework and the Funding Body's responsibilities under the State Aid rules.

² All of these bodies are classed as Non Departmental Public Bodies.

³ Where an entity offers goods and/or services in a market, it is referred to as an "undertaking" under EU and UK competition law.

Assessment Framework



3. Is Notification Required?

- 3.1 The first stage in any State Aid assessment is to establish that the measure will be provided to an "undertaking". In other words, is the institution engaged in an economic activity (i.e. offering goods and/or services) in a given market? This is considered in more detail in the JISC Legal Guidance "How to play fair – a User Guide".
- 3.2 Thereafter, the next step is to assess the measure itself by applying the five key tests:
- Is there a measure?
 - Is it granted by the State or through State resources?
 - Does it favour certain undertakings?
 - Does it distort competition?
 - Is the activity tradable between Member States?
- 3.3 If these tests are answered in the affirmative, then this would suggest that the measure may be notifiable. There are, however, some further issues to be considered which may reduce the Funding Body's notification obligation or remove it completely. These are:
- Do any Block Exemptions apply?
 - Does the measure fall within an existing Approved Scheme?

4. Do any Block Exemptions apply?

- 4.1 If the aid measure fully complies with the conditions in a Block Exemption⁴, it is automatically exempt and does not need to be notified.

De Minimis Aid⁵

- 4.2 The first Block Exemption to consider in the context of BCE activities is that for de minimis aid. This exempts aid to a single undertaking which does not exceed €200,000 (approximately £182,360 at the time of writing⁶) over a three year period (provided that all other criteria are met) and relieves the Member State of the obligation to notify the measure.⁷ The basis for this is that levels of aid which fall within the threshold of €200,000 are deemed not to affect competition and trade between Member States.
- 4.3 The ceiling of €200,000 applies on a rolling three year basis. Accordingly, the granter of the aid (i.e. the Member State) has to take account of all de minimis aid granted to the proposed recipient from all sources over the current year and the preceding two years.

⁴ Block Exemptions are considered in the JISC Legal Guidance "Competition and State Aid – what is the law?"

⁵ Commission Regulation (EC) No. 1998/2006

⁶ The Commission publishes the Euro exchange rate which is to be used to calculate the Sterling equivalent on its website. As at the date of writing (with a Euro rate of 0.911800) the Sterling equivalent would be £182,360.

⁷ Certain sectors are excluded from the *de minimis* exemption, namely fisheries and aquaculture, coal and the primary production of agricultural products

- 4.4 Indeed, there is a positive obligation on the granter to obtain information from the proposed recipient confirming any other de minimis aid received by it during the current and preceding two fiscal years.⁸ The Member State may only grant the new aid if, having checked this information, it considers that the threshold will not be exceeded.

Example

Bloggs Limited is considering applying for a grant of €50,000 from the Engineering and Physical Sciences Research Council for a collaboration project with its local University.

Bloggs Limited has not received any State assistance in the current financial year (2009), although it did receive a grant of €100,000 from its local Enterprise body in 2008 and an R&D grant of €75,000 from the Research Council in 2007. In both cases, Bloggs Limited was advised that no formal action was required as the grants were de minimis.

Leaving aside the issue of notification of the Scheme (and any approval by the Commission), this grant of €50,000 would not be regarded as de minimis aid. For the relevant 3 year period, Bloggs has already accumulated €175,000 of de minimis aid. Accordingly, this new grant would take Bloggs over the €200,000 limit.

Remember, the onus is on the granter (i.e. the Research Council) to check previous grants of de minimis aid to the applicant.

- 4.5 The ceiling of €200,000 is expressed as a cash grant (i.e. in cash terms), before deduction of tax or other charges. Where the aid measure does not take the form of a grant, the "gross grant equivalent" shall be used – in other words, what is the value of the aid in cash terms? Where it is not possible to precisely calculate this equivalent figure, the Block Exemption will not apply.⁹

Example

Jones Limited received an interest free loan from the local Enterprise body for a research and development project.

In this case, the gross grant equivalent would be the difference, in cash terms, between the actual loan rate (i.e. 0%) and the market interest rate prevailing at the time the loan was granted.

⁸ As an alternative, the Member State may set up a central register of all *de minimis* aid granted by the Member State.

⁹ See Article 2 of the Block Exemption. The *De Minimis* Block Exemption only applies to transparent aid – i.e. where the gross grant equivalent can be precisely calculated without the need for a risk assessment.

4.6 It should be noted that if the grant of an aid measure will result in the total de minimis aid exceeding the threshold, the entire proposed aid measure (and not just the excess over the threshold) falls outwith the scope of the Block Exemption.

General Block Exemption Regulation¹⁰

4.7 The new General Block Exemption Regulation ("GBER") covers the following categories of aid:

- Regional aid
- SME investment and employment aid
- Aid for female entrepreneurship
- Aid for environmental protection
- Aid for consultancy in favour of SMEs and SME participation in fairs
- Aid in the form of risk capital
- Aid for research and development and innovation
- Training aid
- Aid for disadvantaged and disabled workers

4.8 Where the measure falls within one of the specified categories and complies with the conditions specified in the GBER (including the specified aid ceilings), the measure does not have to be notified to the Commission. The Member State however is required to forward a summary of the aid measure (in electronic format and in the prescribed form) to the Commission. This is discussed further at paragraphs 4.16 and 6.4 of this Guidance.

4.9 A detailed review of each of these categories falls outwith the scope of this Guidance. Rather, this Guidance will focus on the provisions concerning research and development and innovation ("RDI Provisions").¹¹

RDI Provisions

4.10 The RDI Provisions derive from the Framework. However, if an aid measure falls outside the scope of the RDI provisions, that measure has to be notified to the Commission and will be assessed in accordance with the Framework.

4.11 The GBER sets out a number of general conditions¹² which apply to all categories of aid together with specific conditions for each category, including the RDI Provisions. If an aid scheme or individual measure (whether granted pursuant to a scheme or on an ad hoc basis) meets these conditions, it will be exempt from the notification requirement¹³.

4.12 In terms of the general conditions, the following should be noted:

¹⁰ Commission Regulation (EC) No. 800/2008

¹¹ The RDI Provisions are contained in Section 7 of GBER (Articles 30 – 37)

¹² These are set out in Chapter 1 of GBER.

¹³ The basis for the exemption is that the aid is considered to be compatible with the common market in terms of Article 87(3) of the Treaty.

- **The aid must be transparent**¹⁴ – the GBER specifies categories of aid which are considered to be transparent (i.e. grants and subsidies) and those which are not (capital injections).
- **The aid must have an incentive effect**¹⁵ – the GBER distinguishes between aid to SMEs (where the incentive effect is presumed if the SME applies for the aid before the project/activity has started) and aid to large enterprises. In the latter case, the Member State must also verify that one or more of the specified criteria (i.e. increase in project size or scope) has been met.
- **The aid must not exceed the maximum thresholds**¹⁶ - the GBER sets out specific thresholds; if the aid exceeds the relevant threshold, it falls outwith the GBER and is required to be notified to the Commission. So, for instance, if the project is predominantly fundamental research¹⁷, the threshold is €20 million per undertaking, per project/feasibility study. If the project is predominantly industrial research¹⁸, the threshold is €10 million.

4.13 The special conditions which apply will depend on the nature of the aid in question. The RDI provisions recognise the following aid measures, each with their own specific aid intensities and eligible costs:

- Aid for research and development projects
- Aid for technical feasibility studies
- Aid for industrial property rights costs for SMEs
- Aid for research and development in the agricultural and fisheries sectors
- Aid to young innovative enterprises
- Aid for innovation advisory services and for innovation support services
- Aid for the loan of highly qualified personnel

4.14 For instance, in the case of research and development projects, the aid intensity¹⁹ for fundamental research may not exceed 100% of the eligible costs. So if the eligible costs are calculated to be £1 million, then the aid intensity (i.e. the amount of the aid) cannot exceed £1 million. For industrial research and experimental development, the aid intensities are 50% and 25% respectively of eligible costs. So on the basis of £1 million of eligible costs, the maximum aid amount would be £500,000 and £250,000 respectively.

¹⁴ Article 5 of GBER

¹⁵ Article 8 of GBER

¹⁶ Article 6 of GBER

¹⁷ The GBER defines fundamental research as "experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundations of phenomena and observable facts, without any direct practical application or use in view".

¹⁸ The GBER defines this as "the planned research or critical investigation aimed at the acquisition of new knowledge and skills for developing new products, processes or services or for bringing about a significant improvement in existing products, processes or services. It comprises the creation of components parts to complex systems, which is necessary for the industrial research, notably for generic technology validation, to the exclusion of prototypes".

¹⁹ The aid intensity is basically the amount of allowable aid which is calculated as a percentage of the eligible costs.

- 4.15 The eligible costs for research and development projects are specified in Article 31 of the GBER and include personnel costs (to the extent employed on the project), the costs of instruments and equipment (to the extent and for the period used for the research project) and the costs for buildings and land (to the extent and for the duration of the project).
- 4.16 Accordingly, when assessing the applicability of the RDI Provisions to a particular aid measure, the following matters should be considered:
- Is the nature of the aid measure covered by the RDI Provisions?
 - Are the general conditions satisfied (i.e. transparency, incentive effect and maximum thresholds)?
 - Have the special conditions been met (i.e. eligible costs and aid intensity)?

If any of these questions are answered in the negative, then the GBER does not apply and the aid measure will have to be notified to the Commission. However, if the GBER does apply, the Member State need only send a summary of the aid measure (whether that measure is a scheme or ad hoc individual aid) to the Commission. This must be done within 20 working days of that measure entering into force²⁰.

²⁰ Article 9 of GBER sets out the Member State's reporting obligations in respect of measures exempted by the GBER.

Example

Research Councils UK has established a (publicly financed) Collaboration Fund which it intends to use to encourage institutions and private sector partners to collaborate on research and development projects. The institution and private sector partner will submit a joint application setting out the scope of the project and the project cost. The funding, which will take the form of a non repayable grant, will be paid to the private sector partner – the partner will then be obliged to use that grant to fund the project with the institution. It is envisaged that the institution will own the IP rights in the project's results, but will be free to agree a fee with the private sector partner for the transfer of the rights to it.

RCUK is keen that institutions engage with businesses of all sizes on projects of all sizes. It will therefore offer two funding options:

- (1) Funding of between £10,000 - £50,000 for research and development projects which do not exceed 6 months, and
- (2) Funding of between £100,000 - £500,000 for larger projects which exceed 6 months.

In terms of funding option (1), it may be possible to rely upon the De Minimis block exemption. The potential grants are quite small in relative terms and an individual award, in itself, would fall within the €200,000 threshold (approximately £182,360 at the time of writing²¹).

This threshold however applies to all de minimis aid granted to the proposed recipient during the current and preceding two fiscal years. The funding body has an obligation to establish the extent of any such grants over this period and may only grant the new aid if it considers that the threshold will not be exceeded. If the new funding will result in the recipient exceeding the threshold, it will not benefit from the block exemption.

The same considerations apply to funding option (2). So, for instance, if the proposed recipient has not received any de minimis aid over the three year period, it could conceivably receive up to £182,360 and still benefit from the block exemption. Remember however that the sterling equivalent should be checked at the time of the proposed grant.

For grants which exceed the threshold (either on their own or when combined with previous grants), RCUK may wish to align its proposed scheme with the GBER, in particular the RDI Provisions.

²¹ The Commission publishes the Euro exchange rate which is to be used to calculate the Sterling equivalent on its website. As at the date of writing (with a Euro rate of 0.911800) the Sterling equivalent would be £182,360.

So it would need to consider the nature of the research project (i.e. fundamental research, industrial research or experimental development), whether there was an incentive effect and the eligible costs which applied to that project. It would then have to determine the maximum amount of aid which could be paid. So if the project was classed as industrial research, the maximum amount of aid would be 50% of eligible costs. In such a case, RCUK would therefore not be able to fund the whole project cost through the grant.

If the proposed scheme could be so aligned, RCUK would not have to notify the scheme to the Commission. It would however, have to provide the Commission with a summary of the aid measure. If the scheme could not be aligned, RCUK would have to notify it to the Commission before any grant is made.

One further point to note concerns the IP rights. If the institution decides to transfer the rights to the partner, it should receive the market price for those rights. If it fails to do so, this too may be regarded as an unfair advantage in State Aid terms.

5. Existing Schemes

- 5.1 Where the aid measure does not benefit from a Block Exemption, the next stage is to check if it fits within one of the existing Approved Schemes for the UK.
- 5.2 A Member State may notify an aid scheme to the Commission. If approved, this will allow the Member State to make individual grants under that scheme without the need to notify each such grant. Essentially the benefit is one of administrative convenience – one general notification is made at the outset, as opposed to a number of individual notifications for measures with the same terms which essentially pursue the same objective.
- 5.3 An example of an approved scheme is the Scottish R&D&I scheme which was approved by the Commission on 18 December 2008. The scheme is operated by the Scottish Government, Scottish Enterprise and Highlands and Islands Enterprise and is closely aligned with the Framework. A copy of the Commission's approval (which sets out the terms and conditions of the scheme) is available from the Scottish State Aid Unit's website.²²
- 5.4 Some schemes are specific to Scotland, England, Wales or Northern Ireland, and there are also UK wide schemes in place. These UK wide schemes are administered by the Department for Business, Innovation and Skills ("DBIS").²³

²²http://www.stateaidscotland.gov.uk/state_aid/SA_ApprovalsView.jsp?pContentID=356&p_applic=CCC&p_service=Content.show&

²³ The Department for Business, Innovation and Skills (<http://www.berr.gov.uk/>) has responsibility for State Aid matters in the UK.

5.5 If the aid measure complies with the conditions of the approved scheme, it will not normally require notification. It is however advisable to check the Commission's approval for any reporting obligations. If the measure does not fit within an existing approved scheme, the aid measure will have to be notified to the Commission for approval.

6. Notification

6.1 Where the aid measure does not benefit from a Block Exemption and does not meet the conditions of an existing Approved Scheme, it will require notification. In terms of Article 88(3) of the EC Treaty:

"The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. **The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.**"

6.2 The Commission must therefore be notified of any proposed State Aid measure prior to its implementation. If a notifiable measure is not referred to and approved by the Commission, it is automatically unlawful.

6.3 The obligation to notify rests with the Member State. In the UK, all notifications have to be routed through the Department for Business, Innovation and Skills. Accordingly, if the granter of the aid considers that the measure may raise State Aid issues, the matter should be raised with DBIS at an early stage. In practice however, where the granter is based in Scotland, Wales or Northern Ireland, the initial contact may instead be with the dedicated State Aid Unit for that region.

6.4 The first stage involves the granter of the aid preparing a draft notification form with the assistance of DBIS and, where relevant, the local State Aid Unit. The Commission now operates an online portal through the State Aid Notifications Interactive ("SANI") website for the submission of notifications. If the granter does not already have a SANI account, the DBIS will arrange for one to be created. This allows the granter (in liaison with DBIS/the local State Aid Unit) to create a draft notification and update that draft as appropriate. The SANI system also covers the summary information which the Member State is obliged to submit under the GBER.

6.5 The granter should consider the extent to which the aid measure falls, or can be adjusted to fall, within the scope of Framework.²⁴ After all, if the measure is aligned with the Framework, there is a greater chance of it being approved by the Commission. The Framework describes the Commission's approach to assessing the compatibility of the following aid measures:

²⁴ The Framework essentially sets out the Commission's thinking on the application of the State Aid rules to research, development and innovation, and the conditions under which such aid measures may be considered to be compatible with the EC Treaty, in particular Article 87(3)(c).

- Aid for R&D projects
- Aid for technical feasibility projects
- Aid for industrial property rights costs for SMEs
- Aid for young innovative enterprises
- Aid for process and organisational innovation in services
- Aid for innovation advisory services and for innovation support services
- Aid for the loan of highly qualified personnel
- Aid for innovation clusters

6.6 When the notification has been finalised and validated by the Member State, it will be submitted to the Commission. The Commission has two months to carry out a preliminary examination and may request more information about the measure from the Member State. At the end of this period, it can either approve the aid or initiate a more detailed investigation. If the Commission fails to do either, the measure is deemed to be approved.

6.7 In the event that the Commission opens a formal investigation into the measure, it is obliged to try and reach a decision on the case within 18 months of the commencement of the formal procedure. Beyond this however, there is no specific timeframe for the investigation. The Commission may also take steps to suspend the aid or provisionally recover it pending a final decision on the measure's compatibility with the EC Treaty.²⁵

6.8 The Commission will close its investigation by finding that either:

- The measure does not constitute State Aid
- The aid is approved (i.e. it is considered to be compatible with the EC Treaty)
- The aid is prohibited

In the latter case, the Commission will, except in very limited cases, order the Member State to recover the aid (plus interest) from the recipient. The Commission can also carry out on-site inspections where it has serious doubts that its decision is being complied with.

²⁵ The Member State is given the opportunity to submit its comments on the proposed suspension/provisional recovery. In the case of provisional recovery, there must be an urgency to act and a serious risk of substantial and irreparable damage to a competitor.

7. Summary - Providing funds for BCE

7.1 In summary, the following points should be noted:

Block Exemptions

- In terms of de minimis aid, the threshold of €200,000 applies to all de minimis aid from all sources over the three year period
- In terms of the GBER, have the general conditions been met and the special conditions observed?
- If the measure is covered by the GBER, a summary of the measure must be sent to the Commission

Existing schemes

- Check if the measure complies with the terms of the Approved Scheme in full

Notification

- Notification is required prior to implementation
- The granter should contact the Department for Business, Innovation and Skills and/or its local State Aid Unit for assistance
- If the measure is aligned with the Framework, there is a greater chance of it being approved
- The Commission has an initial period of two months to review the measure
- The formal investigation procedure can last up to 18 months

Author - John Reid

MacRoberts LLP

JISC Legal

04 December 2009