

Guidance Note 11 State Aid

This Guidance Note is for guidance purposes only, and does not constitute legal advice on the subject of State Aid.

Some complementary information is available on the [FCE State Aid scheme](#).

I. Introduction and Overview

State Aid Rules are the European Union's rules controlling the granting of State subsidies, with the aim of ensuring that there is fair competition across the single market.

This Guidance Note sets out the general principles of State Aid, however it is not a definitive text on the subject, and where Project Partners are unclear on aspects of State Aid they should always seek further advice.

As it will be easier to build a project having taken considered State Aid issues from the beginning, rather than attempting to modify a developed project after it is realised that it will contain a risk of State Aid, it is very important that Project Partners consult this guidance note during the development of their project. All applicants should carry out a "self-assessment," exercise on their project, even if they do not initially consider it likely that State Aid rules are relevant to their project, as the application of State Aid rules may be wider than they expect.

If a project is awarded funding that is later deemed to be in breach of State Aid rules, the programme will be required to recover the funding. Although the programme provides advice to projects and assesses the risk of State Aid when the project is considered for selection (See Guidance Note 5 on Project selection), the responsibility for ensuring that the project is State Aid compliant remains with the Partnership.

II. What is State Aid?

The basic definition of State Aid is found in Article 107 of the Treaty of the Functioning of the European Union, which states;

"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 or the production of certain goods in so far as it affects trade between Member States."

For ease of understanding this is often broken down into 5 component parts;

1. **Transfer of State resources** (Financial or otherwise, “in any form”). This can consist of money (such as grants) or other benefits, (such as rent free buildings, free training courses, or specific tax exemptions etc.) This criterion is automatically met when considering direct beneficiaries of the FCE programme as the ERDF funds are considered State Resources.
2. **Undertaking** means any organisation that is engaged in economic activity. This criterion is met regardless of the legal status of the organisation, so public sector organisations such as County Councils may be considered undertakings, along with charities and other not for profit organisations. The test of economic activity is whether or not a market exists, or could exist. The fact that an organisation is providing goods or services for free, entirely financed by the state, does not mean that it is impossible for a market to exist and the activity is not economic activity.

As an example, a Public Authority that fixes solar panels to its buildings and sells the electricity is engaging in economic activity, and support to the purchase of solar panels could be considered State Aid.

3. **Selectivity.** The reference to favouring “certain” undertakings is often described as selectivity. Selectivity has broad meaning in this context, and includes not just selecting a specific organisations, but also support that is specific to a single sector or region. A measure that has general application (such as a tax cut to all businesses) does not constitute State Aid, as it is not selective. The award of grant funding is always selective as a specific group of Project Partners will receive the funding.
4. **Advantage.** In order for a measure to be considered as “favouring” a certain undertaking, it must confer an advantage on the recipient of the funding. Therefore purchase of goods and services at market rates will not be considered State Aid as it is presumed that a company operating at normal market rates will not be gaining a benefit. Therefore adherence to public procurement rules (see Guidance Note 6 Project Implementation) is a strong defence against payments to companies being considered state aid.
5. **Affecting trade between member states:** This final criterion is very broadly interpreted, as if there is a market for goods then it is likely that a company in another member state could provide them, in which case providing an advantage to an undertaking in that market will affect trade between member states. However measures which are purely local, such as supporting a local swimming pool that will not attract tourists from outside the area can be seen as not affecting trade between member states.

Further information can be found on the [European Commission website](#).

III. Approach to State Aid in the France (Channel) England Programme

The France (Channel) England Programme has the ambition of supporting SMEs, and as a part of its contribution to the Europe 2020 objectives it has a strong focus on supporting economic growth. Therefore the programme is keen to facilitate projects that may have State Aid issues and to resolve them through use of the GBER (General Block Exemption Regulation)¹ and De Minimis², as this will allow it to effectively use its funds to achieve its objectives.

Within the programme;

- The JS will provide basic State Aid advice and flag potential State Aid issues during the project development.
- When reviewing Intervention Logic Outlines, JS officers and committee members will indicate if they consider that a project has elements that pose a risk of State Aid.
- When appraising projects applications, Appraising Officers will carry out a State Aid risk assessment exercise.
- Member States, through their representatives at the Project Selection Sub-Committee will consider the applications potential State Aid risks, to ensure that they are satisfied that the project presents a low risk of state aid
- First Level Controllers and Auditors (from the programme, the Commission, and the Court of Auditors) will oversee the projects and the programme to ensure compliance with State Aid Rules.

Although the Programme Authorities will take an active role in supporting projects, it is important to remember that the primary responsibility for ensuring that a project is State Aid Compliant remains with the partnership, and therefore it may be advisable that they seek independent legal advice to clarify issues before the project begins.

Some complement of information is available on the [FCE State Aid scheme](#).

IV. Self-Assessment for State Aid

This section is for guidance purposes only, and should not be treated as legal advice on the subject of State Aid.

The information below provides a step by step guide to carrying out a basic assessment to determine if a project contains a risk of being in breach of State Aid rules.

Step 1 – Identify the potential recipients

The first step is to identify all potential recipients of any aid. All members of a project partnership are automatically in receipt of State Resources, as they are in receipt of Programme Funds. However at the same time it is important to carry out the State Aid analysis for the end users of the project.

Once potential recipients are identified then the following test needs to be applied to all of them. At the project development stage it will be sufficient to consider groups of recipients where the precise identity of the beneficiaries is not known.

¹ Commission Regulation (EU) No 651/2014

² Commission Regulation (EU) No 1407/2013

Example

- A project develops a consultancy service for SMEs in the Programme area. The SMEs that are receiving the consultancy service are potential recipients.
- A project develops a “test site” to be used by companies in the Programme Area to test new forms of Low Carbon electricity generation. The users of this test site are potential recipients.
- A project develops a new technology for attracting tourists to a location, and tests it for free at a tourist attraction. The owner of the tourist attraction is a potential recipient.

Step 2 - Is the transfer to an undertaking?

Is the organisation engaged in economic activity? (Regardless of legal form or purpose)	YES – Proceed to next question NO – No State Aid
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An **Economic Activity** is any activity consisting of offering goods and services on a market, whether or not the entity offering the goods or services is charging for the service or there are other entities offering similar goods or services on the market. The test applied is one of potential rather than of the actual existence of a market in the goods and services.

If an organisation is engaged in economic activity then it is considered an undertaking for the purpose of State Aid Law, irrespective of its legal status or the main purpose of the organisation.

Example

A local authority installs solar panels on the roof of one of its buildings with the intention of selling electricity. Although the main purpose of the local authority is not economic, this part of its activities are considered an “undertaking,” as it is engaged in economic activity.

Step 3 – Advantage

Does the organisation gain an advantage from the project that it would not have had otherwise?	YES – Proceed to next question NO – No State Aid
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This is a test of whether the organisation in question is in a better position, or is potentially in a better position as a result of the transfer of resources. For the direct recipients of the ERDF grant, they will be considered to be at an advantage and this criterion will be met.

When considering the “end users” of a project, if a project is providing something free of charge then this will apply.

Payment for Goods and Services (such as construction work or purchase of equipment) that is made through an open procurement process (See Guidance Note 6 on Project Implementation, Section on Public Procurement) will not be considered a state aid, as carrying out business on the open market is not considered to grant an advantage.

Applying the same principles, if a project output is made available at a market rate then there is no advantage to the end user. This is sometimes described as the “Market Economy Investor Principle,” which is that if it can be demonstrated that a transaction is at the same rate as a private investor, then it is not State Aid.

Example

A project develops a testing rig for testing energy generation systems developed by SMEs in the Programme Area. This is offered free of charge to SMEs. As the SMEs do not have to pay for the use of the rig, they are gaining an advantage as they would usually have to pay for this service.

Alternatively if the project were to charge a market rate for the use of the testing rig, there would be no advantage to the users.

Step 4 – Is the advantage selective?

Is the advantage provided to selected beneficiaries?	YES – Move to next question NO - No State Aid
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If a measure is of general application then it is not considered a State Aid. For a measure to be considered as having general application the advantage it gives needs to be applicable to all undertakings across all sectors. In Interreg projects where there is almost always a targeted region or sector, Aid will almost always be considered to be selective. All direct beneficiaries of the project are recipients of selective aid due to the programmes selection process.

Step 5 – Is there a potential to distort competition and affect trade between member states?

Does the measure have potential to distort competition and affect trade?	YES – State Aid NO – No State Aid
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This is a test of whether the measure will impact on a market in which a supplier or investor from another member state could enter. Only if there is an extremely localised measure will it be considered not to have the potential to affect trade between member states. In the context of an INTERREG Programme where the aim is to deal with problems and challenges that extent across borders, it is very unlikely that activities funded by the programme would be of a nature that does not impact on trade between Member States.

Example

A small grant to a local swimming pool would not be considered to affect trade between member states provided it is primarily used as an amenity for local people and is not a tourist attraction that could attract people from outside the local area.

V. Managing State Aid within a project

If a project contains a risk of state aid, it can either be modified, or the partners should consider if the project fits under one of the State Aid exemptions outlined below. Partners should be aware that the co-financing rates available, as well as the maximum amount of money that can be claimed by an individual partner, may be lower than they have originally planned for in developing their project. Therefore it may be preferable to modify the project idea rather than using the exemptions.

There are three options if a project contains a risk of State Aid;

1. Modify the project to remove the risk of State Aid
2. Apply one of the exemptions within the General Block Exemption Regulation that the Programme has approved for use.
3. Ensure that the aid given falls within the De Minimis Regulation

A. Modifying a project

This can be the most desirable solution as it will reduce the level of monitoring required in the project, however it may require changes that go further than the Partnership is willing to go. The changes required will be bespoke to each project. There are some general steps that all projects can take to minimise risk, but it is advised to discuss the concept with your facilitator to develop a bespoke solution for the project.

General recommendation;

- Ensure that project outputs are freely available to all. If research or technologies developed by a project are freely available for use by all businesses (nb: this means all businesses and not just businesses in the programme area) then the “advantage” element of the above test will not be established, and the risk of State Aid will be reduced

B. Applying a State Aid Exemption

Where a project either cannot be amended, or the necessary amendments would detract from what the Partners wish to achieve there are a number of exemptions that can be applied in order to allow a project to continue. In the FCE programme two specific sets of exemptions are available for projects to use.

When considering the use of these exemptions it is strongly recommended that Partners consult the regulations directly, and where necessary seek their own legal advice in addition to the guidance issued by the programme.

These are;

- The De Minimis regulation³, which sets a financial threshold below which the support is not considered to be a breach of State Aid rules;
- General Block Exemption Regulation (GBER)⁴, which sets out various specific exemptions to State Aid Rules, including a specific exemption for ETC projects.

³ Commission Regulation (EU) No. 1407/2013

⁴ Commission Regulation (EU) No. 651/2014

A Project Partner may be eligible under more than one type of State Aid Exemption. In this case they should consider which one is preferable as each exemption has its own advantages and disadvantages.

These exemptions may be applied at the level of an individual partner, so for some projects it may be possible to apply De Minimis to one partner, and a GBER to another partner in order to find the best possible solution for all partners.

VI. De Minimis

The De Minimis exemption allows for aid to be given to organisations provided the amount given is below a certain threshold. The underlying principle of the De Minimis exemption to State Aid is that below this threshold, aid given will not distort the internal market of the European Union.

The general rule is that the aid will not be considered to breach State Aid rules if the aid is less than 200,000€ from a Member State over any period of three fiscal years⁵. This is a general threshold to which there are two important exemptions; for the Road Freight Sector the threshold is 100,000€ and may not be used to procure vehicles⁶, and the De Minimis exemption may not be used for primary production in Agriculture, Aquaculture or Fisheries. There are separate Di Minimis exemptions for these sectors⁷.

The three year period is considered a rolling period, any aid granted in the current fiscal year and the previous 2 years is counted. If an organisation were to receive 200,000€ in one year, it would then be excluded from receiving any other aid for the next two years. Alternatively, an organisation could receive 66,666.66€ in each year.

It is possible to use Di Minimis alongside other State Aid exemptions, so that if a project has been granted funds for a specific activity under a GBER exemption, it is still possible to receive Di Minimis aid to cover other parts of the project.

However if a partner is receiving aid under more than one exemption, their entire budget for taking part in the project will be set at the lowest applicable co-financing rate allowed under the exemptions. This is to reduce complexity and risk within the project.

The full De Minimis regulation, Regulation (EU) 1407/2013, can be found through this [link](#). It is strongly recommended that Project Partners read the regulation in full before applying the De Minimis exemption.

A. Applying the De Minimis Regulation

In order to use the De Minimis Regulation for partners within the project, the relevant partners must sign a De Minimis declaration and attach it as an Annex to the Application Form. This declaration is available at the end of this Guidance Note as Annex I. This declaration will allow the programme to assess if the organisation is in compliance with the thresholds. Failure to fill in this form correctly could result in funds being recovered if it is found that an organisation has exceeded the threshold for De Minimis aid.

⁵ Article 3(2) of Commission Regulation (EU) No. 1407/2013

⁶ Article 3(3) of Commission Regulation (EU) No. 1407/2013

⁷ For agriculture please consult the agricultural Di Minimis Regulation, Commission Regulation (EU) No. 1408/2013; For Fisheries and Aquaculture please consult Commission Regulation (EU) No 717/2014.

To determine which fiscal year a grant of aid falls into, the date on which the aid is awarded is used rather than the date on which the aid is actually paid out. The date the aid is awarded is defined as the date that the undertaking has the legal right to receive the aid. In the context of a Project Partner, the date of the award is considered to be the date the Grant Offer Letter is signed, even if the money is not paid out until sometime later.

If a project wishes to use the De Minimis exemption in order to provide support to “end users” of the project, then it will need to obtain a similar declaration from each end user. They will also need to calculate the value of the support given in order to record the amount given to each beneficiary, to allow it to be demonstrated that the amount given does not exceed the De Minimis threshold.

Example

A project sets up a consultancy service for SMEs in the Programme area. This is a selective advantage provided to undertakings, but the value of the consultancy will be less than 200,000€ per business supported.

Therefore, the project will ask for a signed De Minimis declaration from each SME receiving the service. In order to determine the amount of the aid, it will compare market rates for similar services in the area.

VII. General Block Exemption Regulation

The General Block Exemption Regulation provides a set of pre-approved areas where a Member State can provide Aid without having to notify the European Commission in advance, and the aid will be considered compatible with the Internal Market.

The programme will use three exemptions set out by this regulation, which are described below. These exemptions offer the chance for beneficiaries who might not be able to take part in a project under De Minimis due to the restrictive cap to be able to partake in the project, however there are in some cases other restrictions, such as lower co-financing rates from the programme. Project Partners are advised to consult the three articles the programme has selected, and compare them to the De Minimis exemption to determine the best course of action for their Partners.

The full GBER regulation, Regulation (EU) 651/2014, can be found through this [link](#). If a project wishes to use one of the exemptions, it is strongly advised that they read the full regulation;

A. Article 20 - Aid for cooperation costs incurred by SMEs participating in European Territorial Cooperation projects

Article 20 allows aid to be given to Small and Medium sized Enterprises (SMEs) that are participating in ETC projects. It covers aid for the following types of expenditure, which have been modelled on the ETC budget lines (see the Guidance Note “Budget Lines and Eligibility”). Therefore this is the simplest

It supports:

- Costs for organisational cooperation including the cost of staff and offices to the extent that it is linked to the cooperation project; (**Office and Administration; Staff Costs**)
- Costs of advisory and support services linked to cooperation and delivered by external consultants and service providers; (**External Expertise and Services**)

- Travel expenses, costs of equipment and investment expenditure directly related to the project and depreciation of tools and equipment used directly for the project. (**Travel and Accommodation; Equipment; and Infrastructure**)

For the External Expertise and Services this may not include costs related to the usual running costs of the SME (such as routine accountancy).

This Article of the GBER is the simplest to apply for ETC projects that involve SMEs, however Partners must be aware that under this Article the co-financing rate of the Programme is restricted to 50% for that Partner, and the maximum amount of aid that may be given is 2 million per SME.

It is also important to remember that if this Article is used the match funding for that Partner may not come from an alternative source of public funding. The remaining 50% must come from private match funding.

Definition of a SME

The meaning of a Small and Medium Sized Enterprises is defined in Annex I of the GBER. This definition applies irrespective of the legal form of the organisation. This definition is important as it is part of the eligibility criteria for Article 20 as described above, and will define the co-financing rates allowable under the Articles described below.

A SME is defined as an enterprise which employs fewer than 250 persons, has an annual turnover of under 50 million euro, and an annual balance sheet of less than 43 million euro.

A Small Enterprise is defined as an enterprise which employs fewer than 50 persons, has an annual turnover of less than 10 million euro and an annual balance sheet of less than 10 million euro.

A Micro-Enterprise is defined as an enterprise which employs fewer than 10 persons, has an annual turnover or less than 2 million euro and an annual balance sheet of less than 2 million euro.

This test is not applied just at the level of a single organisation, but can also be applied where the organisation is part of a group of organisations. For example, if a company is 100% owned by another company, then the two companies are considered together for the purpose of determining their SME status.

B. Article 25 - Aid for research and development projects

This article is aimed at supporting economic growth through innovation, particularly through supporting SMEs and allowing them to reach their full potential. This article is therefore a useful tool for supporting objectives of the programme in supporting innovation that has a commercial potential.

This Article will be primarily of use to Projects applying under Specific Objective 1.1 and 2.1 of the Programme. There is some additional complexity in applying this article to ETC projects when compared to Article 20. However under this Article the amount of aid that can be given to each undertaking is substantially higher than for Article 20, and the allowable co-financing rate can be substantially higher.

However partners should be aware that not all activities contained within this article are necessarily those that would be approved as projects under the FCE Programme.

The precise funding allowable depends on the type of Partner and the type of research being carried out. The table below sets out the basic co-financing rates, however for more detail partners should consult the regulation. Owing to the complexity of this regulation, it is strongly recommended that independent legal advice is sought.

Maximum Funding rates under Article 25

	Fundamental Research	Industrial research	Experimental development	Feasibility studies
Large Enterprises	100%	50%	25%	50%
Medium Enterprises	100%	60%	35%	60%
Small Enterprises	100%	70%	45%	70%

(NB: The maximum funding rate will be capped at the level indicated in the Programme Call documents)

In addition for industrial research and experimental development the rate can be increased a further 15% if the project involves co-operation between undertakings in at least two member states, or one of the undertakings is an SME, or if the research involves collaboration between a University and an undertaking where the University may publish the results and carries at least 10% of the cost.

- **Fundamental research** means experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundations of phenomena and observable facts, without any direct commercial application or use in view;
- **Industrial research** means 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 of complex systems, and may include the construction of prototypes in a laboratory environment or in an environment with simulated interfaces to existing systems as well as of pilot lines, when necessary for the industrial research and notably for generic technology validation;
- **Experimental development** means acquiring, combining, shaping and using existing scientific, technological, business and other relevant knowledge and skills with the aim of developing

new or improved products, processes or services. This may also include, for example, activities aiming at the conceptual definition, planning and documentation of new products, processes or services;

Experimental development may comprise prototyping, demonstrating, piloting, testing and validation of new or improved products, processes or services in environments representative of real life operating conditions where the primary objective is to make further technical improvements on products, processes or services that are not substantially set. This may include the development of a commercially usable prototype or pilot which is necessarily the final commercial product and which is too expensive to produce for it to be used only for demonstration and validation purposes.

Experimental development does not include routine or periodic changes made to existing products, production lines, manufacturing processes, services and other operations in progress, even if those changes may represent improvements;

- **Feasibility study** means the evaluation and analysis of the potential of a project, which aims at supporting the process of decision-making by objectively and rationally uncovering its strengths and weaknesses, opportunities and threats, as well as identifying the resources required to carry it through and ultimately its prospects for success;

The expenditure which is eligible under this article consists of the following (NB: This expenditure would also have to meet with programme rules);

- **Personnel costs:** researchers, technicians and other supporting staff to the extent employed on the project;
- **Costs of instruments and equipment** to the extent and for the period used for the project. Where such instruments and equipment are not used for their full life for the project, only the depreciation costs corresponding to the life of the project, as calculated on the basis of generally accepted accounting principles are considered as eligible.
- **Costs for buildings and land**, to the extent and for the duration period used for the project. With regard to buildings, only the depreciation costs corresponding to the life of the project, as calculated on the basis of generally accepted accounting principles are considered as eligible. For land, costs of commercial transfer or actually incurred capital costs are eligible.
- **Costs of contractual research, knowledge and patents bought or licensed** from outside sources at arm's length conditions, as well as costs of consultancy and equivalent services used exclusively for the project;
- **Additional overheads and other operating expenses**, including costs of materials, supplies and similar products, incurred directly as a result of the project; **these expenses include travel costs;**

C. Article 53 - Aid for culture and heritage conservation

This is a broad exemption which may be of interest to projects seeking to carry out activities related cultural heritage. Projects under this exemption can include investments and operating costs, although the fact that the costs listed below are allowed under the exemption does not automatically mean that they are the form of projects that would be approved under the FCE Programme. This State Aid exemption covers both investment and operating costs.

For investment it covers:

- costs for the construction, upgrade, acquisition, conservation or improvement of infrastructure, if at least 80 % of either the time or the space capacity per year is used for cultural purposes;
- costs for the acquisition, including leasing, transfer of possession or physical relocation of cultural heritage;
- costs for safeguarding, preservation, restoration and rehabilitation of tangible and intangible cultural heritage, including extra costs for storage under appropriate conditions, special tools, materials and costs for documentation, research, digitalisation and publication;
- costs for improving the accessibility of cultural heritage to the public, including costs for digitisation and other new technologies, costs to improve accessibility for persons with special needs (in particular, ramps and lifts for disabled persons, braille indications and hands-on exhibits in museums) and for promoting cultural diversity with respect to presentations, programmes and visitors;
- costs for cultural projects and activities, cooperation and exchange programmes and grants including costs for selection procedures, costs for promotion and costs incurred directly as a result of the project;

For operating costs this exemption covers:

- the cultural institution's or heritage site's costs linked to continuous or periodic activities including exhibitions, performances and events and similar cultural activities that occur in the ordinary course of business;
- costs of cultural and artistic education activities as well as promotion of the understanding of the importance of protection and promotion of the diversity of cultural expressions through educational and greater public awareness programs, including with the use of new technologies;
- costs of the improvement of public access to the cultural institution or heritage sites and activities including costs of digitisation and of use of new technologies as well as costs of improving accessibility for persons with disabilities;
- operating costs directly relating to the cultural project or activity, such as rent or lease of real estate and cultural venues, travel expenses, materials and supplies directly related to the cultural project or activity, architectural structures for exhibitions and stage sets, loan, lease and depreciation of tools, software and equipment, costs for access rights to copyright works and other related intellectual property rights protected contents, costs for promotion and costs incurred directly as a result of the project or activity; depreciation charges and the costs of financing are only eligible if they have not been covered by investment aid;
- costs for personnel working for the cultural institution or heritage site or for a project;
- costs for advisory and support services provided by outside consultants and service providers, incurred directly as a result of the project.

Annex I De Minimis Declaration

Subject: information on the grants received de Minimis

Please complete this declaration of previous State aid received under the de Minimis rule. Using this information we will assess your eligibility to receive assistance. Please note that having received previous aid under the de Minimis Regulation does not automatically disqualify you from receiving further de Minimis aid from the France (Channel) England Programme.

Declaration

I, the undersigned, representing name of the Project Partner organisation and involved as Project Partner in the project (Project Acronym), declare that:

- the institution I represent and all other entities belonging to the same company group as my institution **have not received** any contribution falling under the de Minimis Regulation during the previous three fiscal years (this being the current fiscal year and the previous two fiscal years);

- the institution I represent and all other entities belonging to the same company group as my institution **have received** the following contribution(s) falling under the de Minimis Regulation during the previous three fiscal years (this being the current fiscal year and the previous two fiscal years):

Organisation providing the de Minimis aid	Beneficiary (as defined in Regulation 1407/2013)	Amount of the contribution in EUR		Date of granting
		France	England	
Total				

I acknowledge that untruthful/false declarations, in addition to the administrative sanctions and the request for refunding unduly received contribution charged with the interests, and may also be subject to criminal prosecution.

Date:

Signature:

(Name of the person signing for the beneficiary (and official stamp of the Project Partner where applicable))