

THE EUROPEAN SUSTAINABLE COMPETITIVENESS PROGRAMME FOR NORTHERN IRELAND 2007-2013

MANAGING AUTHORITY GUIDANCE ON THE DISPOSAL OF FUNDED ASSETS



1.0 Introduction

- 1.1 It is important that appropriate terms and conditions are set where public funding is to be used for the acquisition of assets. When granting funds to acquire or develop assets it is essential to take suitable and proportionate steps to safeguard the financial investment.
- 1.2 Managing Public Money Northern Ireland (MPMNI), and in particular, Annex 5.2 entitled 'Protecting Public Instruments (Clawback)', provides full guidance on the terms applicable to grants for the acquisition or improvement of assets and is available at: http://www.aasdni.gov.uk/pubs/MPMNI/mpm_chapters.pdf
Further advice is contained in DAO (DFP) 16/05 re Clawback: Disposal of Publicly Funded Assets.
- 1.3 In addition to compliance with national requirements, Article 57 of Council Regulation (EC) 1083/2006 establishes additional obligations on the Intermediate Body to ensure that operations receiving European funding are maintained for an appropriate period following their completion.
- 1.4 Assets are taken to include (not exclusively), land, property, equipment and intellectual property.

2.0 General Principles

2.1 Current policy indicates that funders should agree a period over which they expect to retain an interest in the funded assets on the basis of outcomes rather than purely on the life of the asset. For a funder to retain an interest in an asset for a lengthy period is neither practical nor desirable. However, this must be balanced with the need to ensure that value for money is achieved in the provision of grant and that assets funded are not misused or abused which would include sale or lease for undue profit.

2.2 There is therefore a need to establish guidance to ensure consistency in:

- The imposition of conditions of grant;
- Level of monitoring and enforcement of conditions;
- Clawback periods defined; and
- Method of calculation of clawback.

3.0 Conditions of Grant

3.1 As outlined in DAO (DFP) 16/05, Intermediate Bodies should consider seeking legal advice about any conditions they want to set. Legal Advisers will need to consider the conditions from the perspective of both UK and EU law, including any implication for state aid. Terms and conditions should be tailored to the circumstances. The conditions should be agreed at the outset, so that both parties have a clear and common understanding about what is expected under the terms of the grant offer. It will often make sense, therefore, to set terms which limit the period over which Intermediate Bodies can exercise a charge, or which progressively diminishes the extent to which a charge should operate. Intermediate Bodies should try to avoid unnecessarily onerous terms and conditions.

3.2 For the purchase or development of land and / or property, it should be possible to take a legal charge over the land/property. Where appropriate, this should be executed in favour of the Intermediate Body as security for any repayment obligations.

- 3.3 Any charge / security must also cover the scenario where a company, as beneficiary, is, wound-up or goes into liquidation, so that there is priority over unsecured creditors.
- 3.4 The most common way of safeguarding financial interests is to set a condition on the grant that gives the Intermediate Body a charge over the asset, i.e. the right to be consulted about the asset being sold or put to an alternative use. On occasions, such a condition could be expressed as the beneficiary agreeing to refund the grant or, more usually to return the proceeds from the sale of the asset to the Intermediate Body, (i.e. for the Intermediate Body to *clawback* the proceeds).
- 3.5 There is no single correct model for clawback. The terms of grants need to suit the circumstances of the case, allowing as much flexibility as seems sensible, particularly where funding can enhance recipients' capacity to develop and provide services over the longer term or to become independent of public funding. Over-rigorous terms may militate against this and therefore not achieve overall value for money. This is particularly so in the case of funding assets acquired by Third Sector bodies.
- 3.6 In setting these terms, Intermediate Bodies need to consider the different circumstances in which assets may be disposed of, and the purpose of the support underlying the original grant. The terms of clawback should therefore reflect the extent of funding, the nature and expected life of the asset being developed, and how to assess when the agreed objectives for the funding have been delivered.
- 3.7 The objectives should be agreed at the outset as part of the process of assessing the application for grant. For example, a beneficiary may agree to ensure that the asset delivers community benefits for a certain period: once the benefits have been delivered and the agreed period has expired, it would make sense for the Intermediate Body's charge, and hence right to clawback, to expire, even though the asset remains in use and has a value.

4.0 Enforcement and Level of Monitoring

- 4.1 In setting terms and conditions for grants, Intermediate Bodies should consider the feasibility of enforcement, with due regard to the legal powers available. Intermediate Bodies should also consider whether conditions should be imposed to cover the position if a company, as beneficiary, was wound-up or went into liquidation, so that the funder would have priority over unsecured creditors. These scenarios should be covered in the terms and conditions of Offer.
- 4.2 The Intermediate Body should keep track of all funded operation's assets and undertake periodic reviews to confirm compliance with any conditions set, both during the lifetime of the project and after closure. Monitoring of compliance should be incorporated into the Intermediate Bodies normal management oversight, audit and review processes.
- 4.3 The Intermediate Body should maintain a clear audit trail where clawback is invoked.

5.0 Valuation of the Charge

- 5.1 In some cases, the grant may have been paid to improve the asset rather than to acquire it. In such cases, Intermediate Bodies should consider whether it would be prudent for the asset to be valued before and after the improvements have been made to provide a basis for calculating any repayments to the funder.

6.0 Clawback period

- 6.1 In addition to the detailed guidance on the options for clawback, which are set out in MPMNI and DAO (DFP) 16/05, Article 57 sets clawback requirements for EU funding arrangements. These are set out below.
- 6.2 A beneficiary may only retain an EU funding contribution, if it does not within five years of the end of the operation (project), make a significant change to the initial grant conditions agreed. Substantial changes, such as the change of ownership, the cessation of an activity or a change to the implementation

arrangements will result in the need for the clawback of EU funds from the beneficiary. A Member State can reduce the clawback time limit of some operations from five to three years, and it has been decided that this relaxation can be applied to expenditure under £5k (see Annex for details).

6.3 In contrast to EU regulations, general guidance states that it is prudent to set the terms of charge and any clawback rights relative to the period over which services are expected to be delivered rather than relative to the life of the asset. Therefore, Intermediate Bodies should consider each grant on a case by case basis and set the higher retention period applicable. Detailed guidance relating to options for determining the charge and clawback periods are contained in the DAO.

6.4 In light of the more stringent EU requirements, the Managing Authority has developed a table (Annex A) which indicates the standard types of grant and clawback periods which should be applied where EU funding is involved. This aims to ensure standardisation across operations (projects) whilst also ensuring that the EU rules are observed.

6.5 There should be scope to retain the charge and review the clawback period if the project has not met the agreed objectives.

7.0 Reporting of Substantial Changes to Operations

7.1 The Intermediate Body must immediately inform the Managing Authority of any significant changes to the implementation of an operation, to enable the following actions:

- To determine and apply the necessary financial correction; and
- The Managing Authority to report the change in the Annual Implementation Report to the Commission.

8.0 Agreeing not to claw back proceeds once an asset is to be sold

- 8.1 Normal guidance allows for occasions where a grant-funded asset is to be sold but the Intermediate Body considers that the proceeds should not be clawed back. Where EU funds are involved (and original grant conditions are still applicable) the Intermediate Body should consult the Managing Authority about the proposal, in advance of entering into any agreement.
- 8.2 Beneficiaries should not be permitted to retain EU funds in lieu of other future grants as this arrangement would not provide a sufficient audit trail and there is a risk that future grants would fall outside the eligible period of the programme.

July 2010

Retention Period

This table outlines suggested retention periods. However, individual projects should be considered on a case by case basis and longer retention periods considered, particularly for major projects involving long term objectives.

These retention periods relate specifically to retention of an interest in the funded assets on the basis of outcomes rather than purely on the life of the asset.

| Category | Objective | Retention Period | Reduction per annum F1* |
|---|--|-------------------------|---|
| Funding a Profit-making organisation where the asset consists of land, real estate, plant or machinery. | Increased productivity / output. | 10 yrs | 10% |
| Purchase or development of land. | Sustainability | 10 yrs | 10% |
| Purchase or development of Real estate. | Sustainability | 10 yrs | 10% |
| Purchase or development of land. | Tourism, job creation, provision of childcare / social facilities. | 5 yrs | 20% |
| Purchase or development of Real estate. | Tourism, job creation, provision of childcare / social facilities. | 5 yrs | 20% |
| Purchase of equipment/machinery with value in excess of £10,000 | Increased productivity / output. | 5 yrs | 20% |
| Purchase of equipment/machinery with value less than £5,000 *F1 | Training or general core running of the organisation. | 3 yrs | Y1 (0-12mths) – 20% Y2 – 50% Y3 – 80% |

* **Footnote 1:** The annual reduction in value of an asset is expressed as a percentage of the original total cost.