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INTRODUCTION

Scope and purpose

This guidance explains the range of management and delivery arrangements – ‘delivery models’ for short – used to implement European Structural Funds projects in Wales.

The models apply **only to grants** funded by the European Regional Development Fund (ERDF) or the European Social Fund (ESF) in Wales. Therefore, the guidance does not apply to other types of financial support from the Structural Funds programmes in the form of financial instruments – repayable support such as loans and equity investments – or to other EU programmes and funds.

Finally, while this guidance addresses the question of **when** procurement may, or must, be used in help deliver projects, the rules and procedures on **how** to undertake a procurement exercise are not within the scope of this document. Similarly, this document does not aim to provide advice on complying with European State aid rules.

Introduction to management and delivery models

While EU legislation establishes the ground rules and definitions on how Structural Funds programmes must be implemented – for example, by defining ‘beneficiary’ and ‘operation’ – there is still flexibility to shape delivery models to suit national and regional arrangements. The programme managing authority (WEFO) can define what constitutes a ‘project’ for audit and control purposes and decide how groups of related projects funded will be approved and administered.

Continuing the successful approach used in the 2007-2013 programmes, there are **three key principles** that underpin the delivery models:

- Programme funds are invested in a relatively small number of strategically-focused investments, maximising the opportunities for organisations to collaborate and add value;
- Delivery models are designed with the primary aim of achieving an effective, economic, efficient, and compliant use of the EU funds; and
- Delivery models must help facilitate an equitable and fair distribution of the EU funds to the organisations best placed to carry out the work and services, balanced with the need to achieve value for money and respect EU State aid rules.

These three core principles give rise to the need to clearly define the roles, responsibilities and relationships between the funding applicant; the organisations managing projects; delivery teams; and, where applicable, the people and businesses that receive financial support.

To help determine an appropriate delivery model, it is important to understand what is meant by the 'operation', its 'projects', and the 'beneficiaries'.

1) What is the **'operation'**?

- WEFO awards funding for an operation. The operation could comprise one or many projects, possible hundreds of projects in larger-scale grant schemes.
- Where WEFO has designated an Intermediate Body (IB) to help manage operations involving many projects, such as a grant scheme, the IB will select beneficiaries and award funding in an operation approved by WEFO. In other words, Intermediate Bodies do not approve operations – only WEFO carries out this role.

2) What are the **projects** and who are the **beneficiaries** in the operation?

- A project is the actions/ activities carried out by a beneficiary in an operation. An operation with, for example, four beneficiaries therefore contains four projects. Put another way, the number of beneficiaries in an operation determines the number of individual projects.
- Only WEFO, or in certain cases an Intermediate Body, can select beneficiaries (and as a consequence, approve projects).
- In cases where an operation intends to award grants (direct financial support) and this support constitutes State aid, the organisation that receives the financial support is a 'beneficiary' in the operation: not the grant awarding body. So in some cases, such as larger-scale grant schemes, WEFO may decide to approve an allocation of funding to an operation (the grant fund) but then delegate the responsibilities for selecting beneficiaries and awarding grants to an 'Intermediate Body' (IB). This could be another Welsh Government department or an external organisation.

Part 1 explains these considerations in more detail.

PART 1: OPERATIONS, PROJECTS AND BENEFICIARIES

1.1 Operations and projects

Before agreeing a suitable delivery model with WEFO, it is essential to understand the meaning of some important terms used by WEFO and the European Commission.

The objectives and desired results of the Wales Structural Funds programmes are designed to be achieved by WEFO awarding funding to a number of 'operations'.

An operation may consist of a single project (the term 'project'/'operation' can be used interchangeably in such cases) or, more typically, a group of related projects. In such cases, each beneficiary is implementing an individual project within the operation. A worked example is provided in **Annex A**.

Defining the 'projects' in an operation is a critical step because each project needs to be capable of being separately identifiable for administrative, reporting and audit purposes.

For example, auditors may choose only to examine one project even if the operation consists of a group of projects. When submitting regular payment claims to WEFO, the itemised list of eligible costs and income received for the claim period must identify the project (the beneficiary) that the transactions relate to.

Therefore, it is important to understand whether an operation is considered by WEFO to contain more than one project:

Joint beneficiaries

Where WEFO approves the involvement of one or more joint beneficiaries in a collaborative operation, each beneficiary in the operation is considered to be managing its own distinct project. Each project, in agreement with the lead beneficiary, undertakes its own activities, incurs its own costs and contributes towards the operation's output and results targets.

For example: an operation contains a main ('lead') beneficiary and one other joint beneficiary approved by WEFO. This operation therefore consists of two projects, one managed by the lead beneficiary and the other managed by the joint beneficiary.

Operations delivering grant schemes (State aid)

In operations set up as a grant scheme to provide direct financial support to companies¹ throughout the implementation of the operation, the organisations that receive the support – the State aid recipients – are the beneficiaries of the operation.

The grant awarding body is not the beneficiary. Therefore each beneficiary is considered to be implementing a project in that operation.

- Care is needed to avoid double-counting the number of projects in such operations where additional instalments of financial support are provided to the same beneficiary for the same investment purpose (still only one project despite several instalments). However, the same beneficiary accessing funds from the same grant scheme operation for an unrelated investment – not an extension of the previous funding – does result in another distinct WEFO ‘project’ in that operation.
- This approach to classifying ‘projects’ relates exclusively to expenditure claims and audit procedures – it does not concern how outputs and results are defined and reported to WEFO when a beneficiary is supported more than once by an operation. Separate WEFO guidance is available for this purpose, see: www.gov.wales/funding/eu-funds/2014-2020/delivering-your-project

Projects that contribute to more than one programme ‘specific objective’

Where a beneficiary delivers actions that will contribute to **more than one ‘specific objective’** of the corresponding programme priority, it is necessary to account separately for the financial data and outputs for each specific objective. However, the beneficiary is still regarded as carrying out a single project for audit purposes.

Where the beneficiary undertakes activities and incurs costs relating to more than one Specific Objective of a programme priority, any shared costs will need to be allocated and coded to each specific objective on a fair, objective and consistent basis. A suitable cost allocation method must therefore be agreed with WEFO.

Further information about specific objectives and programme priorities are provided in the WEFO application and appraisal guidance documents, see: www.gov.wales/funding/eu-funds/2014-2020/applying

State aid rules that require costs and activities to be distinguished from other activities

In cases where State aid rules require a beneficiary to clearly distinguish between different activities, and their costs, within the same WEFO project, the beneficiary must put arrangements in place to comply with these rules for the purposes of State aid compliance. However, this is still administered and audited as a single project in terms of WEFO delivery models. This situation may arise, for example, when different actions or activities are being delivered by the same beneficiary and different State aid rules apply to each action.

Approval of project activity

It should be remembered that beneficiaries cannot unilaterally decide on which activities to perform or what actions to deliver – these are the basis of the WEFO funding decision and must therefore be set out in the WEFO Business Plan - or equivalent documents submitted to the Intermediate Body if applicable - along with the estimated costs of the proposed activities. Only WEFO, or the Intermediate Body, can appraise, select and approve projects and their component actions/ activities.

So where a beneficiary has a broad idea of an action or the activities required to deliver the action, but not the full details - e.g. does not yet know the activities required, where it will happen, how it will happen, and therefore the estimated costs – then this cannot be included in the approved activities and costs for the operation until WEFO is able to assess the full details. Approval of funding without details of the activities to be supported would, in effect, be a grant scheme.

This is because only WEFO, or an IB, can select beneficiaries and approve their proposed activities. In addition, verifications and audits of the operation will need to assess whether the activities undertaken by the beneficiary adhere to what was initially agreed by WEFO or the IB when the funding decision was made. Expenditure is ineligible for EU support if it relates to activities that were not approved by WEFO or, if applicable, the IB.

Existing operations can of course be re-assessed by WEFO during implementation to add additional actions, activities, costs, or additional joint beneficiaries.

<p><i>NOTE FOR WEFO STAFF: PPIMS 'case ID' is the operation and not projects within an operation.</i></p>
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1.2 Beneficiaries

The beneficiary is the organisation responsible for initiating a project, or initiating and implementing a project². In cases where an operation is benefitting from State aid, the body which receives the aid is the beneficiary.

Beneficiaries can be any public or private legal entity, subject to WEFO, or Intermediate Body if applicable, being satisfied that they have the administrative, financial and operational capacity to fulfil the conditions regarding the provision of funding.

The funding applicant becomes a beneficiary when the funds are approved, entering into a contractual funding agreement with WEFO, or IB, that sets out the beneficiary funding terms and conditions of support.

The identity and approval of all beneficiaries in an operation is critical because, as a general rule, the EU Structural Funds are only intended to reimburse costs incurred and paid by beneficiaries.

WEFO, or an IB, must therefore **approve all beneficiaries** that intend to declare eligible expenditure in an operation so that the details are recorded by WEFO, their qualification criteria checked and the related due diligence work performed.

NOTE FOR WEFO STAFF: PPIMS must capture the name, address, VAT status, and contact details of all beneficiaries approved in an operation – not just the lead beneficiary. This is a regulatory requirement.

To determine whether an organisation qualifies to become a beneficiary, WEFO will need to understand the organisation's interest, financial commitment and proposed engagement in the operation or its projects. An organisation simply seeking to gain a commercial or financial advantage through their engagement in a Structural Funds operation does not meet the characteristics of a genuine EU funds beneficiary and would therefore be better placed to look for opportunities to become a service provider or contractor on commercial terms following an open competition by the beneficiaries.

To help decide whether a proposed beneficiary meets the above definition, WEFO will consider the general aims and purpose of the organisation, i.e. the reason why it exists, and the proposed financial contribution to the operation, whether from its own financial resources or through the ability to secure third party match funding, in 'cash' terms or as contributions in kind.

1.2.1 Beneficiaries in collaborative operations (lead and joint beneficiaries)

WEFO is continuing the successful, strategic approach used in 2007-2013 programmes by directing funding to a relatively small number of large-scale or collaborative operations.

‘Collaborative operations’ are partnerships between at least two organisations to achieve the shared goals and objectives set out in the WEFO Business Plan by:

- jointly contributing to its management and delivery;
- sharing risks, obligations, outputs and results; and
- exchanging knowledge, expertise and good practice to help deliver a successful operation **in a better way than could be achieved if undertaken as separate operations.**

These partnerships of beneficiaries will typically cooperate in the development, management and delivery of an operation, contributing financial and non-financial resources as a demonstration of the genuine commitment to the goals of the operation beyond any purely self-interest or commercially-driven motive.

The Structural Funds legislation only foresees programme managing authorities (WEFO) approving operations and issuing grant agreements to a single beneficiary, other than in State aid schemes where every grant recipient is a beneficiary.

However, the European Commission is content that other organisations may be approved by the managing authority to incur expenditure in an operation on the same basis as the beneficiary³.

Therefore, WEFO enters into a funding agreement with a single organisation: either a sole **beneficiary** or a **lead beneficiary** in collaboration with other partners (**joint beneficiaries**).

Where joint beneficiaries are approved, the WEFO funding agreement requires the lead beneficiary to inform the joint beneficiaries of the rules and conditions for EU support as set out in the funding agreement. To support this, joint beneficiaries are provided with a copy of the WEFO funding agreement and sign a declaration, annexed to the funding agreement, as confirmation that they are aware of the rules and conditions that apply to the activities and costs they intend to declare in their role as a joint beneficiary.

However, the lead beneficiary, being the only legal entity formally entering into a funding agreement with WEFO, retains overall financial and legal responsibility for the operation and their role is therefore critical to the overall success of all projects.

To be accepted as a joint beneficiary for an operation, an organisation must meet the criteria of a genuine beneficiary as set out above.

In collaborative operations, the lead beneficiary:

- Assumes responsibility for the overall success of the operation.
- Satisfies itself that eligible expenditure presented to them by joint beneficiaries relates only to managing, or managing and delivering, the activities and actions agreed by the lead beneficiary and in accordance with the WEFO business plan and funding agreement.
- Establishes written arrangements with joint beneficiaries to include, for example, the need to comply with all applicable eligibility rules and protocols for contributing to any amounts recovered by WEFO in respect of ineligible expenditure (see **Annex B**).
- Ensures that the other beneficiaries receive the total amount of the public contribution due to them from the EU funds and, if applicable, from national public match funding, in respect of the joint beneficiary's eligible expenditure, as quickly as possible and in full. No amounts must be deducted or withheld by the lead beneficiary and no specific charge, or other charge with equivalent effect, may be levied that would reduce that amount due to the other beneficiaries.

Audits, verifications and any related investigations may be performed on any beneficiary in an operation – not just the lead beneficiary. However, ultimate legal and financial responsibility for the operation – including liability in the first instance to repay EU grant to WEFO if compliance requirements are not met – contractually resides with the lead beneficiary, being the legal entity who enters into a funding agreement with WEFO.

Therefore, lead beneficiaries are **strongly advised** to put appropriate risk-sharing, governance and management systems in place to support the arrangements with joint beneficiaries, including issues such as contribution to amounts recovered by WEFO due to a joint beneficiary's non-compliance with funding conditions.

It is for lead beneficiaries to decide on the most suitable form of such arrangements, for example, formal agreements, service level agreement, memorandum of understanding, informal agreement etc. A template checklist for such agreements is provided in **Annex B**.

WEFO can consider adding additional joint beneficiaries to existing operations during its implementation where there are good reasons why the beneficiary - or a new project being added to the operation - could not reasonably have been identified at the start of the operation.

WEFO will assess whether the new joint beneficiary has the administrative, financial and operational capacity to fulfil the conditions for receiving EU funds. In addition, WEFO needs to assess the State aid implications of enabling the new organisation

to receive public funds, both the EU support and, if applicable, national public match funding to be provided to joint beneficiaries.

In relation to compliance with State aid rules, WEFO will need to understand the State aid implications for all beneficiaries, delivery agents/ service providers, final recipients of assistance; not solely the aid provided to the lead beneficiary by WEFO.

So even though WEFO only completes a funding agreement and disburses funds to lead beneficiaries, for State aid purposes the lead beneficiary is simply a channel for transferring the public aid to the joint beneficiaries and does not retain any financial advantage in respect of the amounts paid to those partner beneficiaries. The recipients of State aid are therefore all the beneficiaries in an operation and the value of State aid will vary between beneficiaries in line with the amount of public funds received to reimburse their respective costs.

See **Annex C** for information about the management, control and audit arrangements in collaborative operations.

1.2.2 New organisations applying to become a beneficiary

A group of organisations may prefer to establish a new, jointly managed organisation to manage and deliver an operation, for example using a special purpose vehicle or similar legal entity.

WEFO will consider such proposals on a case-by-case basis, considering value for money; expertise and competence, particularly in the absence of financial and organisational history; risk of corporate dependency on the EU funds; and restraints on exit strategy and legacy proposals.

Before approving any organisation as a beneficiary (sole, lead, joint, new or established), the European Commission requires WEFO to ensure that the beneficiary has the administrative, financial and operational capacity to fulfil the conditions regarding the receipt of EU funding.

WEFO may also undertake other due diligence checks on proposed beneficiaries, for example checking on how the organisation has undertaken its responsibilities for grants received from the Welsh Government, if applicable.

1.2.3 Beneficiaries of grant schemes (when subject to State aid rules)

In operations set up as a grant scheme to provide direct financial support to companies¹ throughout the implementation of the operation, the organisations that receive the support – the State aid recipients – are the beneficiaries of the operation. The grant awarding body is not the beneficiary. See **2.3.1** for more details.

PART 2: DELIVERY ARRANGEMENTS

2.1 Direct delivery by beneficiaries

Direct delivery, sometimes called 'in-house' delivery, means that the beneficiary implements the project's activities themselves, utilising the organisation's resources to deliver the agreed activities. The beneficiary retains full responsibility for the management and delivery of the activities. The beneficiary may need to buy-in external services, goods and supplies, including the possible letting of contracts in relation to some categories of costs, but the beneficiary remains in overall charge of delivering the project.

2.2 Contracted/ procured delivery

Contracted delivery (sometimes called 'outsourcing' or 'procured delivery') means that a beneficiary arranges for works contractors or service providers to take on the responsibility of delivering the project's activities. The contractor then has contractual obligations to implement the agreed activities and deliver the agreed outputs, products or services in return for the agreed price set out in the contract.

The beneficiary's role – in respect of the contracted activities – is mainly to set up the contract/ delivery agreement in a compliant manner, in many cases this will include a competitive procurement procedure, and then manage the contract throughout delivery by ensuring that contractors perform all agreed contractual conditions and invoices are only paid for satisfactory performance.

Even when all delivery activities are contracted, the beneficiary will still undertake tasks related to managing and administering an EU funded project e.g. financial management, claims to WEFO for reimbursement of costs, information and publicity measures, monitoring data, reporting, progress reports, facilitating audits and verifications etc. These core tasks remain the responsibility of the beneficiary and are therefore not expected to be contracted to other organisations unless for expert services such as evaluations.

It is essential that all contracts clearly set out the relevant EU funding rules and conditions that apply to the activities to be delivered by a contractor or service provider, for example:

- Treatment of project revenue and other income.
- Durability rules (conditions that apply after the completion of the operation).
- ESF participant records, including: evidence that each individual meets the entry conditions for the support; enrolment forms; presence sheets etc.
- Geographic eligibility rules (if the contractor is to provide support to businesses or individuals).
- Possible State aid issues if the contractor is channelling aid to 'end recipients'.

- Record-keeping arrangements, including suitable access if selected for audits, verifications or investigations.

Contracted delivery may increase a project's budget as contracts agreed on commercial terms in a competitive market will generally involve a profit margin rather than a 'costs only' basis when activity is carried out by a beneficiary. However, contracting is necessary where:

SCENARIO A: State aid rules prevent a beneficiary from receiving public aid to directly deliver the agreed activities because the support is deemed to be State aid and the beneficiary is not able to obtain any suitable State aid cover (a block exemption, de minimis aid, notified or approved schemes); or

SCENARIO B: The beneficiary does not have the necessary expertise, capability or capacity to deliver the activities in-house and therefore the use of contracted deliverers is discussed and agreed with WEFO.

For clarity, references in this guidance document to 'contracting' or 'procuring' activities could, in practice, mean:

- A new procurement procedure/ a new contract; or
- Using existing contracts if originally set up using a compliant procurement procedure; or
- Using established Framework Agreements if set up using a compliant procurement procedure.

The use of existing contracts or Framework Agreements is subject to the availability of the original documents to demonstrate that they were created in full compliance with the EU, national and WEFO rules applicable at that time.

Remember, 'how' to let contracts, including respecting applicable EU and national procurement rules, is outside the scope of this guidance document.

See **Annex D** for information about the State aid, public funding of 'economic activity' and the potential to distort competition.

Finally, the Structural Funds rules do not recognise contracts awarded by a beneficiary to themselves, irrespective of the legal validity of such contracts. So if this occurs, the beneficiary is still considered to carry out **direct delivery** – not procured delivery – and so costs are only eligible if actually incurred and paid out to a contractor or employee or the use of simplified cost options if available.

Contracted delivery is the presumed delivery arrangement to be used as it supports an equitable and fair distribution of the EU funds to the organisations best placed to carry out the work and services. There are some specific exceptions, please see **Annex E** for specific guidance on the following cases:

- Scenario 1: Direct delivery by beneficiaries when the activity is subject to State aid rules
- Scenario 2: Beneficiary competing for direct delivery
- Scenario 3: Presumption of direct delivery for certain activities delivered by Further Education Institutions in Wales
- Scenario 4: Contract awards without competition (direct award)

2.3 Grant schemes

Grant schemes are created when the funding applicant - the beneficiary or an Intermediate Body - asks WEFO to approve an operation that enables them to disburse funds to other organisations, or possibly to individuals.

Before approving such schemes, WEFO will need to understand the intervention logic behind such a delivery mechanism and understand how it will provide the required contribution to the programme's specific objectives e.g. how will disbursing funds to others help achieve the results sought by that programme priority.

2.3.1 Grants subject to State aid rules

In this situation, the operation uses the allocated EU funds to disburse State aid to a number of companies¹.

The operation provides individual State aid awards to companies where the public support is provided under a notified or registered State aid scheme or awarded using de minimis aid rules².

To recap from Part 1, in cases where an operation is benefitting from State aid, the body which receives the aid is the 'beneficiary'. So the beneficiaries in such schemes are the organisations receiving the public aid² and not the organisation managing the operation and performing the role of scheme administrator.

In relation to disbursing ESF/ ERDF grants in Wales, the body granting the aid to beneficiaries throughout the implementation of the operation will either be an Intermediate Body, designated by WEFO, or WEFO could decide to manage the scheme itself if there are very few award decisions to be made.

The costs incurred by WEFO or the IB in managing and implementing such schemes are not eligible for reimbursement from the grant scheme operation itself – because they are not costs incurred by beneficiaries in that particular operation – but costs can be considered for funding support through a separate operation using programme 'Technical Assistance'. WEFO will advise any proposed Intermediate Body of these arrangements.

Important note:

The fact that beneficiaries in a WEFO operation are considered to be in receipt of State aid, including aid covered by a notified/ approved State aid scheme or within the de minimis aid rules, does not mean that Intermediate Bodies must be appointed.

The possible use of Intermediate Bodies only arises when the beneficiaries of an operation (the aid recipients) are not known at the point that WEFO approves the operation because the beneficiaries/ projects will be selected during the implementation of the operation.

Even then, WEFO could decide to make those beneficiary/ project assessment and selection decisions itself rather than ask an Intermediate Body to carry out the work on its behalf.

In terms of funding eligibility rules, expenditure is deemed 'incurred and paid out' when actually spent by the aid scheme beneficiaries: not when paid out by the scheme manager to the beneficiary. However, WEFO cannot declare the expenditure to the EC until all the public contribution due to be paid to the beneficiary has actually been paid. In respect of this rule, public contribution means both the EU grant and, if applicable, public match funding due to the beneficiary from national, regional or local public authorities. The beneficiary's own match funding contributions to projects, if applicable, are therefore not affected by this rule.

More about 'aid schemes'

This guidance document is not intended to provide guidance on State aid but the points below may help clarify the references to 'aid scheme'

- Aid schemes could relate to a scheme using the provisions in the General Block Exemption Regulation (GBER), a de minimis scheme, or an individual scheme approved directly by the European Commission (EC).
- Once established, State aid schemes are assigned a unique reference number.
- The Welsh Government's State Aid Unit maintains and publishes a register of GBER schemes applicable in Wales, see www.wales.gov.uk/topics/businessandconomy/stateaid/schemes
- When schemes are notified to the EC for approval - or submitted to the EC where advance approval is not necessary - the EC must be informed whether the scheme will be co-financed by EU funds and if so, the amounts of funding from each specific EU fund.
- The EC refers to the body that will award aid to beneficiaries as the 'Granting Authority' or 'aid awarding authority' (for the Structural Funds, this can only be WEFO or an IB).

2.3.2 Grant schemes outside the scope of State aid

In some cases, WEFO can allow beneficiaries to provide grants/ direct financial support to other organisations or individuals as long as such support is outside the scope of State aid rules. For example, payments of bursaries or allowances to participants in European Social Fund operations.

In these cases, a beneficiary – not an IB or WEFO – manages the funding scheme and awards the financial support to the final recipients. The scheme must have a clearly defined purpose, aligned to the operation's agreed output/ results targets. Before approving such schemes, WEFO will need to understand the intervention logic behind such a delivery mechanism and understand how it will help achieve the operation's goals e.g. how will disbursing funds to others help achieve the results sought by that programme priority.

This type of grant scheme cannot be used to appoint partners to help the beneficiary manage or deliver the operation. Management and delivery partners must be a joint beneficiary, approved by WEFO, or a contractor/ service provider procured by the beneficiary.

Therefore it is important to distinguish between:

- Organisations/ people being supported by an operation = grant schemes are possible.
- Organisations/ people managing or delivering an operation = beneficiaries (to be approved by WEFO).

WEFO must be satisfied that a grant scheme is the best value-for-money way of the operation achieving its agreed objectives, taking into account the increased administration and control costs associated with running a grant scheme.

In these grant schemes, the financial support that the beneficiary provides to grant recipients is not subject to the rules on State aid i.e. does not concern 'economic' activities or involves support to individuals (not State aid 'undertakings') such as ESF allowances, bursaries or stipends paid to participants.

The following general rules apply:

- The WEFO Business Plan must describe how the grants will be provided for a defined purpose, aligned with the targets, indicators and outputs of the operation and therefore contributing directly to the objectives of the programme priority.
- The eligibility, assessment and selection criteria for the award of financial support must be **agreed with WEFO**. Audits and verifications will examine whether the criteria agreed by WEFO was subsequently implemented in practice. There is no requirement for WEFO to assess or approve individual funding awards – the

organisation making the grant award (lead or joint beneficiary) carries out this task.

- The organisations or individuals receiving financial support from the beneficiary's support scheme are grant recipients but not 'beneficiaries'.
- The organisation awarding the grant (lead or joint beneficiary) is responsible for the eligibility of expenditure and related audit trails and record-keeping – not the grant recipient. Similarly, audits and verifications will take place at the level of beneficiary and not at the level of grant recipient.
- The organisation awarding the grant (lead or joint beneficiary) must use grant award letters to set out the terms and conditions for recipients such as information and publicity measures and the circumstances in which funds may need to be repaid to the beneficiary, for example, if an individual receives a bursary/ allowance but does not complete the related funding condition (to complete the course, obtain the qualification, attend the interview etc.).

The WEFO Business Plan, or similar documents, must also describe the proposed grant management and administrative arrangements, including:

- How will calls for grants be made – permanent 'open call' system (first-come first-served until funds depleted) or temporary, time-limited calls (competitive awards)?
- How will calls be advertised?
- How will grant applications be appraised (qualifying criteria, eligibility conditions and, if a competition, the award criteria)?
 - Note that WEFO requires grant scheme eligibility criteria, at a minimum, to be **non-discriminatory, transparent, fair and objective**.
 - WEFO must therefore examine and approve the proposed assessment and award criteria before the first funding decisions are made.
 - Any changes to the criteria must similarly be submitted to WEFO for approval before use.
- How will the grants be contracted/ documented/ written terms and conditions?
- Where will supporting documents and audit trails for spending by grant recipients be held (if this is the basis of the grant award). How will all parties be informed of the record-keeping and document retention periods, along with the access to records and staff in relation to audits, verifications and related investigations?
- What grant intervention rate will be used, if not 100%, and who will provide the match funding contribution for the funding gap?
- How, and when, will the funds be paid out to grant recipients, in particular, with reference to the timing on when EU funds are paid out by WEFO?
- How, and when, will the eligible grant expenditure be declared to WEFO for payment of the EU grant?

- What controls and checks will take place on how grant funds are used and the eligible costs that will generate a payment of the grant?

The beneficiary will therefore need to inform WEFO whether grants will be:

Direct (non-competitive) awards

- Funds to be awarded to all applicants meeting the eligibility and qualifying conditions.
- Funding opportunities to be advertised widely/ equality of access for all potential applicants.
- Funding awards made on first-come, first-served basis – i.e. all qualifying applicants will be awarded funding until the grant scheme has used all its funds.
- Beneficiary provides written ‘grant terms and conditions’ to the grant recipient.

or,

Competitive awards

- Beneficiary awards grant to ‘best’ applicant from competing bids in line with agreed selection and assessment criteria.
- Funding opportunities must be advertised widely/ equality of access for potential applicants.
- Can be a useful way of ensuring transparent and equitable distribution of funding.
- Suitable where there is more than one potential grant applicant qualifying for limited funding.
- Beneficiary provides written ‘grant terms and conditions’ to successful bidder (grant recipient).

In terms of eligibility rules, expenditure is deemed ‘incurred and paid out’ when the beneficiary disburses payments to the grant recipient. The grant scheme rules must describe the basis of such payments. Note that if the grant payment is dependent on the funding applicant demonstrating that they have incurred and paid out certain eligible costs, the beneficiary – not the grant recipient – must retain these documents for future audits and verifications.

For clarity, grant recipient organisations or individuals are not regarded as ‘projects’ for audit purposes – projects are implemented by beneficiaries and grant recipients are not beneficiaries.

2.4 Combining delivery mechanisms

It is possible that some operations, especially larger collaborative, ‘multi-project’ operations, will have combinations of delivery mechanisms e.g. some activities or

projects will be 'direct delivery', including some contracted suppliers and services, and other activities or projects will be fully 'contracted delivery'.

When making decisions about whether contracted delivery is a requirement, it is feasible that an operation could have elements of both economic and non-economic activity. In such circumstances, WEFO will stipulate conditions whereby funding for the delivery of non-economic activities is ring-fenced for direct delivery and funding for 'economic' activities being made subject to contracted delivery.

Operations delivering **State aid grants** to beneficiaries (see above 'type 1' grant schemes) **should not be mixed with any other activity/ budget lines** due to the complexities that arise in accounting for the work and costs of the Intermediate Body. Any other activities, even if closely connected with the aid scheme, can be considered for support but as a separate operation. WEFO may allow 'mixed' operations on a duly justified exceptional basis.

PART 3: SUMMARY

3.1 Summary

The delivery models offer a flexible range of delivery mechanism designed to achieve value for money and avoid any potential conflicts with EU Structural Funds, State aid and Public Procurement legislation.

WEFO will review the models from time to time and any changes will apply for new operations approved following the publication of revised guidance.

Finally, please note that the EU Structural Funds legislation provides the legal basis to introduce other types of delivery mechanism for grants but these are not currently used in Wales, for example: Intermediate Bodies authorised to approve operations (so called 'global grant' arrangements); public-private partnerships; repayable assistance; integrated territorial investments; Joint Action Plans; and direct contracting by WEFO. However, the only approaches used by WEFO are the ones described in this document.

3.2 End notes

¹ the term 'companies' is used for simplicity as this guidance is not a State aid guidance note. More accurately, this means aid to an undertaking engaged in an economic activity, regardless of its legal status or the way in which it is financed. Therefore, public sector/ third sector organisations could also meet this definition if engaged in economic activity. Not-for-profit, or loss-making, organisations are also therefore 'undertakings' if offering goods or services on a market.

²EU Regulation 1303/2013 (article 2) explains that, in relation to grant support from the Structural Funds, the beneficiary is the body with responsibility for initiating – or initiating and implementing – the operation. The regulation also clarifies that in the context of State aid schemes, the beneficiary is considered to be the body receiving the aid (not the body granting the aid). It is further clarified that, for the purposes of the Regulation, the reference to 'State aid' scheme also includes de minimis aid.

³See, for example, statement by the European Commission in Council document 5609/13 ADD5 REV 1, 25 February 2013:

'... it is fully admissible that an operation may be implemented in an institutional structure consisting of a beneficiary and several entities (partners) authorised to incur eligible expenditure, among which the division of tasks

related to initiation and implementation of the operation occurs. In such a situation, expenditure which has been incurred and paid by the partners may be considered as incurred and by a beneficiary...'

⁴ Communication from the Commission, Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, 17 January 2014
europa.eu/rapid/press-release

PART 4: ANNEXES

ANNEX A

Terminology: a worked example (*illustrative only – not specific to Wales*)

TERMINOLOGY	EXAMPLE
Specific Objective	Improving accessibility of a region in a sustainable manner
Operation	Two 'projects' (lead beneficiary and one joint beneficiary)
Projects / Actions <i>What will be done</i> (<i>'WHAT' / 'WHY' / 'WHERE'</i>)	<u>Action 1</u> . Invest in railway system to move traffic from roads to rail. <u>Action 2</u> . Improve public roads.
Activities <i>How the actions will be delivered</i> (<i>'HOW' 'WHO' 'WHEN'</i>)	Consider <u>DELIVERY MODELS</u> here <u>Action 1</u> – lead beneficiary (project 1). Two project activities: Activity X (in-house direct delivery) <ul style="list-style-type: none"> ○ Activity Y (procured contract) <u>Action 2</u> – joint beneficiary (project 2): <ul style="list-style-type: none"> ➤ One activity. Activity Z (procured contract).
Eligible costs <i>Financial cost of implementing the agreed activities</i>	E.g. Invoices to pay contractor for works performed satisfactorily.
Products and services <i>Tangible/ intangible</i>	Road constructed. Railway line reconstructed or upgraded

<i>evidence of actions</i>	
<p>Output indicator / target</p> <p><i>Direct products of the operation which, in turn, will contribute to results. Indications of progress towards results. Quantitative: physical or monetary units.</i></p>	<p>Km of road constructed / e.g. 10km of road constructed.</p> <p>Total length of reconstructed or upgraded railway line/ e.g. 3km of railway line reconstructed</p>
<p>Specific Objective result indicator</p> <p><i>Indications of whether specific objective has been realised.</i></p>	<p>E.g. Reduction in travel time, meaning an improvement in accessibility to the region.</p>

ANNEX B

Collaborative operations: partnership agreement & model checklist

While the lead beneficiary is responsible for ensuring the successful implementation of the entire operation, other approved beneficiaries are also responsible for ensuring the successful and compliant implementation of their part of the operation.

Joint beneficiaries are therefore required to give full support to the lead beneficiary to ensure the successful implementation of the overall operation, its high quality and fulfilment of its objectives.

A written partnership agreement provides a framework for this efficient project implementation and governance arrangements, to help secure the operation's compliance with the Structural Funds programmes.

In collaborative operations, management and delivery arrangements are inherently more complex than in operations with a single beneficiary. For this reason, the risks associated are arguably greater. The use of a written partnership agreement should help reduce these risks:

- By clearly defining and raising awareness on mutual responsibilities and procedures for each partner beneficiary and within the operation as a whole. A partnership agreement should make it easier to implement operations and their projects. The agreement lays out important principles that secure the sound financial management of the operation's budget, including arrangements for recovering any amounts unduly paid;
- The existence of a partnership agreement means that if problems arise, established procedures can be used to arrive at a solution. Although, in practice, most problems can be solved in more informal ways such as regular communication and meetings;
- More generally, the use of partnership agreements is a prudent measure which provides a way of minimising the various types of risks involved in carrying out collaborative operations.

Good Practice

The Beneficiary offers to all partner beneficiaries a collaborative partnership agreement, either in the form of a bilateral or multi-lateral written agreement, or as a unilateral notification with an acceptance period for the partner beneficiary.

In terms of timing, it is recommended to indicate the submission of the first progress report or partner's expenditure claim, whichever comes first, as the deadline for conclusion of the written agreement between the partners.

A checklist for partnership agreements is provided below, which then can be adjusted to the specific content and needs of the operation.

The level of detail required for the contents of a partnership agreement varies. The WEFO Business Plan, Delivery Profile and Funding Agreement will normally cover many of the issues that might typically be included in a partnership agreement. Rather than duplicating its contents, these additional documents can be annexed to the actual partnership agreement and referred to in the text of the agreement.

Remember, as explained in the WEFO Funding Agreement, the lead beneficiary may elect to put more formal legal arrangements in place with its joint beneficiaries. It is for the lead beneficiary to decide whether to use the partnership agreement suggested in this document or an alternative method such as service level agreement, formal contracts, protocols etc.

Checklist of issues to be included in a Partnership Agreement (or similar document)

1. The parties of the agreement, i.e. the beneficiary and the partner beneficiary(ies);
2. The subject/ aim, duration, and nature of the agreement. i.e. partners as approved beneficiaries of the EU grant, as well as content of the partner's project (objectives, results to be achieved, eligibility period), reference to the WEFO Funding Agreement (partner beneficiaries should be provided with a copy of the Funding Agreement).
3. The budgetary allocations, based on the WEFO Funding Agreement and arrangements for any common 'shared costs';
4. Procedures and deadlines for payments to partner beneficiaries from the lead beneficiary, accounts to be used, exchange rate (if applicable), handling of generated revenues, de-commitment rules or spending plan for partner beneficiaries, based on the WEFO Funding Agreement/ Delivery Profile;
5. Partnership principles, mutual obligations and responsibilities for partner beneficiaries (e.g. timely information, reporting etc.), as well as their rights (e.g.

for partner beneficiaries to receive payment in full, for the lead beneficiary not to accept expenditure declarations in specified circumstances).

6. Decision-making procedures (e.g. steering/ management group if any) and overall governance and management arrangements for the operation (lead beneficiary and partner beneficiaries tasks);
7. Reporting obligations and procedures for partner beneficiaries, including reporting deadlines reporting on outputs indicators as foreseen in the Business Plan, targets to be reached (e.g. milestones) and consequences of not reaching them;
8. Conditions for project changes, for budget changes and virement, deviation to approved activities, rights and procedures to terminate the partnership agreement, i.e. withdraw partner beneficiaries from the operation;
9. Obligation to comply with the applicable eligibility rules and conditions at EU, programme and national levels, including any simplified costs options;
10. Key eligibility rules of particular relevance or high risk, for example, Procurement rules; State aid rules (e.g. de-minimis), VAT rules (e.g. exceptions).
11. Obligations and rights related to information and publicity, asset ownership arrangements, intellectual property rights as well as EU 'durability' rules;
12. Provisions on the required audit trail, such as the deadlines for keeping supporting documents after project closure;
13. Details of the internal controls that partner beneficiaries need to implement on their activities and expenditure. Details of checks to be undertaken by the lead beneficiary, specifying the rights and obligations of the lead beneficiary, partner beneficiaries, WEFO, audit authority, and EU institutions;
14. Provisions on audit and verification of projects, including deadlines for making documents available to auditors and verification staff in order for them to be able to conclude their work on time;
15. Financial liabilities: consequences/ penalties in case of failures to deliver and in case of irregularities, recovery obligations and procedures, i.e. procedures for withdrawal and recovery of unduly paid amounts, deadlines for repaying funds. Liabilities for any flat-rate corrections applied to the operation due to systemic errors, which cannot be traced back to an individual partner beneficiary, or arrangements in case of suspension of payments. Liabilities to third parties;
16. Project closure arrangements, in particular financing for reporting activities after the eligibility period;
17. Rules for amendments to the partnership agreements.

ACKNOWLEDGEMENT: *This agreement is based on the 'Project Partnership Agreement' published by interact-eu.net that sets out good practice in European Territorial Cooperation programmes where partnerships of beneficiaries, including*

the lead and joint beneficiary concept, is a core requirement. However, significant changes have been made to adapt it to WEFO's regional programmes.

ANNEX C

Collaborative operations: controls, audits and verifications

Each beneficiary has first-level responsibility for ensuring that **its** activities and expenditure it reports as eligible is legal, regular and complies with all applicable European Union, UK and Welsh laws. The copy of the WEFO Funding Agreement provided by the lead beneficiary clarifies the applicable rules and conditions.

- Joint beneficiary is therefore responsible for the expenditure it declares to the lead beneficiary.
- Lead beneficiary is therefore responsible for its own project expenditure declared to WEFO as well as for supervisory checks on expenditure declared by joint beneficiaries.

To support this first-level responsibility and provide the required assurance, each beneficiary must have **its own** management and control procedures in place, both to prevent and to detect potentially incorrect claim declarations to the lead beneficiary, that are proportionate to the size of the organisation and the nature of the particular project.

Where necessary, the lead beneficiary can assist the joint beneficiaries to design and implement effective management and control systems on their activity and expenditure. However, the purpose of internal controls are to prevent and detect errors before the joint beneficiary declares the expenditure to the lead beneficiary - rather than the lead beneficiary performing checks on claims received from joint beneficiaries in order to detect errors. Therefore, where the lead beneficiary needs to support joint beneficiaries, the focus must be strengthening staff knowledge and expertise and helping design preventative controls such as training and support, second-person reviews, approvals, authorisations and sample checks by the joint beneficiary's own staff.

These internal control checks are not to be confused with the 'verifications' or 'audits' referred to in EU Regulations. Verifications are a function reserved exclusively for WEFO – either through its own staff or using contractors - or delegated by WEFO to an Intermediate Body.

WEFO will verify the expenditure and outputs reported by joint beneficiaries and does not require lead beneficiaries to perform this function.

Similarly, 'audits' are only undertaken by the designated Audit Authority (Welsh Government, European Funds Audit Team), the European Commission or the European Court of Auditors.

So within the meaning of the EU Regulations, ‘verifications’ or ‘audits’ are not tasks ever undertaken by beneficiaries.

The costs of designing and implementing management and control procedures, including cases where the lead beneficiary assists another beneficiary as outlined above, are eligible project costs (as they are deemed to be essential project management, control and administration work) subject to standard eligibility conditions such as adequate documentary proof and audit trails, value for money and not excessive or unnecessary.

The lead beneficiary must perform accuracy and completeness checks on expenditure declared by other beneficiaries. This means:

- Checking arithmetical accuracy, agreeing that the total amounts declared agree to underlying schedules and lists of payments and receipts.
- Checking that the joint beneficiary is using a separate accounting code, or separate accounting system, for recording all financial transactions related to their project(s).
- Checking that the joint beneficiary has not exceeded agreed budget allocations.
- Performing a reasonability test on the amounts declared in schedules and lists of payments and receipts, to look for unusual, unexpected, or possibly incorrect items. If required, the lead beneficiary can then contact the joint beneficiary to resolve any query, and amend the claim if required, before the details are declared to WEFO for its payments and verifications checks.
- All discrepancies must be investigated and resolved before the expenditure is declared to WEFO.
- Subject to the above points, there is no further requirement for the lead beneficiary to routinely inspect supporting documents for the costs and outputs declared by each of the joint beneficiaries.

It is WEFO’s role to verify that expenditure declared in each claim, relating to all beneficiaries, is eligible, has been paid out – or complied with simplified cost rules if applicable - and that it complies with applicable law, the operational programme and the conditions of support of the operation.

ANNEX D

‘Economic activity’ within the context of State aid rules

Important note: The following information is provided to help understand what is meant by the reference in this guidance document to economic activities. However, this guidance is not intended to provide advice or guidance on State aid rules and it should therefore not be relied upon for this purpose. WEFO will be able to seek advice from the Welsh Government’s State aid unit on specific cases but ultimately, it is for potential aid recipients or administrators – beneficiaries or Intermediate Bodies – to seek their own specialist legal advice on complying with European Union law such as State aid.

The following is based on recently published European Commission statements:⁴

- The Court of Justice of the European Union has consistently held that any activity consisting in offering goods and services on a market is an economic activity.
- The existence of ‘a market’ is difficult to establish: what is not an economic activity today may turn into one in the future, and vice versa. Therefore, it is not possible to produce a list of ‘economic activities’ in the EU as it will change over time and vary from country to country.
- Economic activity can exist where, in open market conditions, other operators would be willing and able to provide the service in the market concerned. Therefore, a decision of a public authority not to allow third parties to bid to deliver certain services, favouring in-house provision, does not rule out the presence of ‘economic activity’.
- Where public bodies offer services that are economic in nature when competing private organisations exist, these are regarded as economic activities.
- Infrastructure investments can be economic activity if intended to be commercially exploited, for example, a commercial airport runway.
- The absence of any tender bids or expressions of interest/ quotations following advertising, or the inability to identify potential providers does not mean that an activity is outside the scope of the State aid rules. For all practical purposes, a distortion of competition is assumed when aid is granted in a liberalised sector where there is, or could be, competition.
- There is no risk of distortion of competition when public support is provided to a legal monopoly (established in compliance with EU law), that is not in competition with (liberalised) services, and when the service provide cannot be active, due to

regulatory or statutory constraints, in any other liberalised market (geographical or product).

- Similarly, while State aid is concerned with distorting intra-EU trade, public support can be considered as State aid even if the recipient is not directly involved in cross-border trade because, for example, public subsidies could make it more difficult for economic operators in other EU Member States to enter the market by maintaining or increasing local supply.
- Even for organisations who only provide local or regional services, public support could constitute State aid as it could have a detrimental effect on operators based in other Member States who may want to provide those services or establish themselves in another Member State.

ANNEX E

Direct Delivery or Procurement: Specific Cases

Scenario 1: Project activity assessed as ‘economic’ (in terms of State aid) but the beneficiary is unable to identify a suitable contractor to perform the work. Alternatively, WEFO agrees that there are compelling reasons why direct delivery is the best delivery option, even if ‘economic’ in terms of State aid.

This scenario could arise, for example, where:

- There is no active market of potential providers for the type of work or services required (within the EU); or
- A market exists but no bids are received from potential providers following open advertising or issuing direct invitations to submit a tender; or
- Regardless of the potential bidders in the market, or their interest in bidding for the contract, WEFO agrees that no contract advertising is required as there are compelling reasons why the beneficiary should directly deliver the activities. For example: where the beneficiary has unique or specialist role in the proposed activities that other providers could not replicate; certain activities in the further education sector (see scenario 3 below); significant value for money advantages; unique relationship with the ESF target client group etc.

Firstly, it is important to acknowledge that State aid rules are concerned with the potential to distort competitive markets. State aid rules are also concerned with potential markets i.e. providing public aid now could lead to market distortion by adding barriers to potential economic operators entering the market in the future. For example, potential future providers based in other EU countries may be deterred from establishing themselves in the UK if governments are, in effect, providing subsidies to the established domestic companies.

Similarly, State aid rules are concerned with an EU-wide marketplace, not regional or national markets. So this could mean that a project needs to implement ‘economic activity’ but no potential providers bid for the work because they do not want to, or are not able to, serve the particular geographic area where the contract work must be performed.

In this scenario:

- WEFO allows the beneficiary to ‘directly deliver’ the activities if compliant with State aid rules. Suitable State aid cover therefore needs to be obtained e.g. de minimis aid, a block exemption (GBER), classified as ‘no aid’ under Commission framework or guidelines, Services of General Economic Interest, individual approval in advance by the Commission etc.

- If the decision to allow direct delivery is based on the absence of bids from potential providers, WEFO still requires the beneficiary to advertise the contract opportunity in the normal way and keep supporting documents to record that that no bids, or no suitable bids, were received. Clearly, there must be no suggestion that a beneficiary drafts contract specifications and advertises in a way that deters potential providers from bidding for the work.
- Similarly, records should be retained, if applicable, to justify why the decision was taken that advertising the contract opportunity would be futile as, for example, there was sufficient evidence to conclude that there were no potential bidders in the market.
- Where WEFO has agreed that the contracts opportunities did not need to be advertised (hard to replicate, unique, specialist connection to target client group etc.), then the beneficiary must retain evidence that WEFO provided this agreement, either through the original business plan description or separately via e-mail or similar correspondence from WEFO.
- Remember, 'direct delivery' by the beneficiary means that the eligible costs can be declared to WEFO but the beneficiary cannot add a profit margin/ mark-up to their costs as if performing a contract on commercial terms.

Where no State aid cover is available and the beneficiary cannot attract any interest from potential market providers, the beneficiary will need to consider alternative solutions such as:

- re-designing the specification of the activities to more closely align to the products and services that potential providers could feasibly deliver;
- in collaborative operations, reconsider which beneficiaries are best placed to deliver the activities of the operation given the available State aid cover available to each organisation (e.g. access to de minimis aid); or
- if the beneficiary normally provides the economic activities in question on a commercial basis, there may be a possibility of using the State aid '*market economic operator*' test if sufficient evidence is available to evidence the market prices normally charged for the work. This can be complex to administer and audit and beneficiaries should therefore discuss this with WEFO if this is the only option. It is likely that the beneficiary will need specialist legal/ State aid advice on this option.

Scenario 2: Beneficiary wants to bid for contracts

In this scenario, the delivery model requires procured delivery but a beneficiary, or a closely related company, may also want to bid for the contract.

General principles

WEFO cannot recognise contracts that a beneficiary awards to itself because subsequent contract payments would not meet the definition of a cost being actually paid out by the beneficiary. It would also be difficult to assess contract performance and seek redress for underperformance if the contracting organisation and the contractor are the same legal entity. Therefore, regardless of the legal validity of such contracts, WEFO would consider such arrangements to be 'direct delivery' and not procured delivery by a contractor (see 2.2, Scenario B).

This also means that State aid cover must be considered as the beneficiary is in receipt of public funds (a grant) to subsidise economic activities rather than receiving payment for services (a contract).

Despite these challenges, a beneficiary may argue that there is a strong case for WEFO to allow them to directly deliver activity rather than procure for delivery.

In such cases, WEFO will consider suitably justified exceptions to the presumption of procured delivery on a case-by-case basis – see Scenario 1 above for details. To approve to such an approach, WEFO would need to be convinced of the strength of the case to mitigate the risk of potential complaints by other market providers that one of their competitors - the beneficiary - is receiving a public subsidy to deliver economic/ commercial activity (even though it would comply with State aid rules). For these reasons, this approach is strictly 'by exception'.

If WEFO agrees that the beneficiary can carry out the activities, this would be treated as 'direct delivery' and not 'contracted delivery'.

Operations with more than one beneficiary

As explained in sections 1.1 and 1.2, each 'lead' or 'joint' beneficiary is deemed to be carrying out a discrete 'project' within the overall operation. Each project consists of one or more strands of project 'activity'. For these reasons, it is therefore possible that procurement procedures may be carried out by a joint or lead beneficiary for their own project activities.

It is possible for a beneficiary to bid for contracts being awarded by other beneficiaries in the same operation because two separate legal entities are involved – the contracting organisation and the bidder/ contractor. If the bidder (who also happens to be a beneficiary) is successful, their role in delivering those

services/works would be that of a procured service provider/ contractor for those project activities.

However, there are heightened compliance risks with such an approach that need to be carefully considered.

While advice on procurement procedures are outside the scope of this document, it is worth pointing out some key principles and associated risks:

- The bidder (beneficiary) must have no advantage or favourable treatment compared to other bidders, including preferential access to information or personnel on the procurement team.
- Particular care would be needed regarding information in the WEFO business plan, related application documents, WEFO funding agreement and similar documents that the bidder (beneficiary) would be able to access. Any information in these documents relevant to the procurement procedure may need to be provided to all bidders/ potential bidders.
- This is particularly challenging if a lead beneficiary intends to bid for a contract being awarded by a joint beneficiary because the lead organisation will have in-depth information on all planned activities and estimated budgets for procured activity.

In order to address the risk of actual, or perceived, conflicts of interest in such procurement procedures, WEFO recommends that specialist procurement and/or legal advice is obtained to advise on putting appropriate safeguards in place such as enhanced conflicts of interest procedures; commissioning independent or external procurement teams; clear ethical walls (physical, management and communication barriers between bidder and procurement team).

Awarding contracts to companies related to/ closely connected to a beneficiary

The WEFO funding agreement is issued to a single legal entity – not to a group of companies – therefore it is possible for contract bids to be submitted by other legal entities even if they have a close connection to the beneficiary e.g.

- Subsidiary companies
- Associated companies
- Joint ventures/ special purpose vehicles
- Other companies that can be influenced or controlled by the beneficiary or its directors (common directors; common owners etc.)

These related companies may bid for contracts awarded by the beneficiary, and be recognised by WEFO as procured delivery, subject to:

- Equal treatment of all bidders and no favourable or preferential treatment (i.e. same principles as explained in ‘operations with more than one beneficiary’ section above).

- A contract must exist between two separate legal entities (the contracting organisation and the contractor).
- Contract payments must be disbursed from the beneficiary's bank account ('paid out') and transmitted to the bank account of the contractor. Notional transaction/ inter-company accounting adjustments would not be acceptable evidence that the contract payments were actually paid out.

Scenario 3: Presumption of direct delivery for certain activities delivered by Further Education institutions in Wales

Where project activities are in alignment with - or pursuant/ supplemental to - the core activities of government funded further education institutions, WEFO does not regard the delivery of such activity as having a significant impact on the market and, accordingly, direct delivery by the beneficiary is allowed, subject to WEFO being satisfied that this represents value for money use of EU public funds.

The reason for this approach is that further education sector in Wales has a statutory underpinning, with the Welsh Government responsible for securing the provision and funding of core further education and training.

However, where the activity is assessed as 'economic' in nature - from a State aid perspective, reflecting the latest State aid legislation and case law at the time of the assessment - delivery must be opened up to competition through a procurement exercise. Commonly, this will apply where other market operators already deliver the activity in the geographic area served by the institution (e.g. on a commercial basis or under other public programmes). Beneficiaries will also have the opportunity to bid to deliver the activity as set out in scenario 2 above.

If an operation comprises both economic and non-economic activities involving a number of joint beneficiaries, WEFO will put in place arrangements so that the non-economic activity is ring-fenced for direct delivery and the economic activity subject to contracted delivery.

Scenario 4: Contract awards without competition (direct award)

For certain works, supplies and services, there is only one possible contractor, provider or supplier in the market because they have the **exclusive right** to undertake that work under national or European laws, regulations or similar administrative provisions, for example, in regulated industries with single (legal monopoly) providers.

Where a project needs to obtain these works, services or suppliers, it is acceptable to directly enter into contracts without advertising as an open procurement exercise is clearly not necessary.

Basis of contract pricing

Without a competitive market, the beneficiary will not be able to determine a 'market value' as assurance of the value for money use of public funds. Therefore, the contract must be priced in line with the approach set out in the related legal or regulatory provisions (e.g. regulated tariffs, industry rate cards, statutory cost-plus pricing etc.).

Where no pricing benchmark or regulated price structure exist – this would be very rare as, in effect, the contractor could 'name their own price' in the absence of competition – then the following approach should be followed:

- Contract pricing can reflect the 'full costs' of the works, services or supplies.
- Profit margins/ cost mark-ups can only be used where the beneficiary can obtain reliable and auditable evidence of those margins/ mark-ups normally applied by the contractor for the same, or broadly similar, type of work or services.
- 'Full costs' means all costs recording in the contractor's accounting system coded or linked to the performance of the contract and subject to the contractor's usual accounting practices being applied. The apportionment of the contractor's central costs, such as premises overheads, are therefore eligible costs if in line with the contractor's usual accounting practice for recovering central costs in contract pricing. However, 'full costs' must not include the expenditure items specifically disallowed under the Wales Structural Funds national eligibility rules such as bad debt provisions, political donations, gifts, contingent liabilities etc. as set out in the WEFO document '*Rules and Conditions for Support from the European Structural and Investment Funds 2014-2020*'.
- 'Cost' based contracting is administratively burdensome, and risky from a compliance perspective, as it requires the beneficiary to perform regular checks on the accounting records and supporting documents of the contractor in order to validate the amounts declared in the contractor's invoices. The beneficiary must therefore ensure that the agreed contract terms include the rights of access needed to verify these costs. Structural Funds audits and verifications will also need to see supporting documents at the beneficiary's premises that confirms that the beneficiary has undertaken these checks before it approved the payment of the related invoices.
- The contractor must not be a beneficiary in the operation.



For more information:

www.gov.wales/eu-funding

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