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## **Controlling state aids**

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# Controlling state aids

## The Commission's recent plan is distinctly ambitious

By *Eric Morgan de Rivery and Nelly Le Berre-Dodet\**

Commenting on the recently-published state aid action plan, the commissioner for competition Neelie Kroes declared that it “launches a comprehensive, coherent and far-reaching reform of state aid policy, as a direct contribution to the renewed Lisbon strategy for economic growth and more and better jobs” (see *References*, below). The 2005 state aid action plan has four objectives: (1) fewer and better-targeted state aids; (2) a more refined economic approach; (3) more efficient procedures, better enforcement, higher predictability and enhanced transparency; and (4) a shared responsibility between the Commission and member states.

### **The particularities of state aid control**

The Commission's initiatives and objectives are to be welcomed and encouraged, particularly as this new initiative for the reform of EU competition law (following the reform of merger control and antitrust rules) confronts specific difficulties that cannot be ignored.

### ***Inherently political context***

State aid control is political in nature and is consequently subject to considerations beyond the purely legal or economic. The fundamental principle of state aid prohibits any aid granted by a member state or through state resources that distorts or threatens to distort competition within the common market by favouring certain undertakings. Nonetheless, member states may have good political reasons to grant aid to certain sectors or companies, and consequently there are exceptions to the prohibition and control of state aids.

### ***Beyond standard competition analysis***

A major difficulty in state aid regimes arises from the fact that such control is not based on standard competition analysis as under articles 81 and 82 EC. Indeed, the analysis conducted under articles 87 and 88 EC, which aims to assess the compatibility of an aid with the common market, is not based solely on a market appreciation that is limited to verifying whether normal market conditions are maintained. Broader and more diverse considerations are taken into account, such as the possibility of an aid achieving objectives other than free and undistorted competition (eg economic growth, improved levels of employment, social cohesion and environmental protection), which are also recognised as contributing to a balanced and liveable Community.

It is even questionable whether the same notion of “competition” is addressed by state aid articles 87 and 88 EC, as that addressed in competition law articles 81 and 82 EC. The latter articles clearly deal with competition between

undertakings. However, is this always true under articles 87 and 88 EC, or do these articles instead raise the issue of competition between member states?

In such context, it is difficult to present a clear and transparent framework for the assessment of the compatibility of state aids. As long as member states have not agreed, at the Community level, on a list of clearly-identified priorities, the Commission will have considerable difficulty in issuing guidelines to enhance predictability and legal security. However, this is not to suggest that the control of state aids cannot be achieved. It is simply a practical observation that the Commission's target of full transparency in state aid will face considerable hurdles.

### **The Commission's proposed state aid action plan**

#### ***Fewer and better-targeted state aids***

In 2003, state aids awarded within the European Union totalled some €53bn (see *References*, below). The Commission intends to reduce this amount, which at first sight would appear quite laudable when considering the objectives of free and undistorted competition. However, the absolute necessity of reducing state aids may be questioned where such aids seek to enhance innovation and R&D, an area in which Europe lags considerably behind other developed regions such as the US. This also raises the second aspect of the Commission's proposal, namely redirecting aids towards more horizontal objectives, rather than on individual aid to certain companies or sectors. Such approach must be a priority, in view of the tendency of member states to prop up declining sectors and national champions. But will the Community carry sufficient political weight to police this effectively?

#### ***A refined economic approach***

This objective is clearly in line with a general trend within the Commission's initiatives in competition matters over the last recent years and within the framework of the above-mentioned reforms of EU competition rules. However, in the light of the inevitably political profile of state aids, a refined economic approach will have limitations in practice. Although it may provide a better assessment of the precise scope and impact on competition of a particular state aid measure, this will be of little help in assessing the appropriateness of the political objectives that inspired the adoption of the contemplated scheme.

#### ***More efficient procedures etc***

More efficient procedures, better enforcement, higher predictability and enhanced transparency can only be

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welcome, particularly since the field of state aids is characterised by a maze of intricate (and sometimes unnecessary) rules that have accumulated over the years. In particular, the Commission intends to:

- reduce the number of notifications and to adopt a “super” block exemption regulation aimed at freeing broader categories of aids from notification obligations to the Commission prior to implementation – eg aid in favour of SMEs, training, employment, R&D, environmental and regional aids (in this new context, member states will therefore bear an increased burden of verifying that the contemplated measures fall within the scope of the block exemption regulations); and
- reform certain Community frameworks (eg R&D, innovation and environment) and issue new guidelines (for example, the Commission will consider whether to issue guidance on the assessment of public resources involved in public / private partnerships designed to assist member states in creating new infrastructure in the fields of transport, energy or information technology).

While these efforts to promote greater transparency are commendable, they will also face the difficulty of achieving the Community-level definition of clearer rules and legal frameworks that are extremely sensitive to political trends and choices. Although the Commission may wish to simplify state aid rules and reduce the number of texts, it also recognises that it cannot escape the revision and replacement of existing Community frameworks that will soon expire. The Commission thus apparently renounces its wish to streamline the entire body of legislation.

### ***A shared responsibility between the Commission and member states.***

The Commission seeks to increase members state involvement, or at least achieve a more efficient control of state aids. To achieve this goal, the Commission suggests various measures, including in particular:

- (1) a more efficient implementation of state aid rules by national judges, penalising the lack of prior notification of state aid measures and ensuring the provisional recovery of illegal (ie unnotified) aid or executing recovery decisions;

- (2) the appointment of independent authorities to facilitate the early detection of state aids; and
- (3) better co-operation between member states and the Commission when a state aid case is opened (eg by providing timely responses to Commission questions).

All of these measures, if correctly applied, could dramatically improve the implementation of state aid legislation. However, each of these targets represents a formidable task. First, national judges are already reluctant to apply EU antitrust rules to undertakings, and are even more reticent in implementing such rules against their own national authorities. Second, the appointment of new authorities charged with the early assessment of state aids might give rise to a number of problems, such as:

- (1) a constitutional issue regarding the Commission’s exclusive role in assessing the compatibility of state aid measures;
- (2) the difficulty of identifying entities capable of ensuring the early detection of measures qualifying as state aids; or
- (3) the even greater difficulty of ensuring the right level of co-operation from the vast number of entities potentially capable of granting state aids.

Against this background, it is clear that the announced reform of state aids rules undoubtedly raises more complex and wider issues than the previous reforms of the EU competition rules. This is mainly because this area touches less on the oversight of private market forces along broadly accepted lines, and much more on the independence of member states in defining their industrial policy and social equilibrium. Indeed, these are two key elements that are still considered as part of the sovereignty of member states. In this context, a lively debate may be anticipated from the political and social forces of the Community during the Commission’s consultation over the state aid action plan.

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### **References**

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