NEW DEVELOPMENTS IN STATE AID POLICY

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Ladies and Gentlemen,

1. INTRODUCTION

I would like to begin my remarks by thanking you for the invitation to speak to you today about new developments in State aid policy. Unlike antitrust and merger reform, there is no single major instrument of State aid reform. So it is not surprising that State aid reform has received less attention. Nevertheless this should not disguise the fact that very real changes are taking place.

2. GENERAL APPROACH TO STATE AID CONTROL

When I was appointed as competition Commissioner, I underlined my determination to ensure a strict control of State aid. This objective has received support at the highest political level. At the Stockholm European Council, Member States committed themselves to continue their efforts to reduce the general level of State aid expressed as a percentage of the gross domestic product (GDP) by 2003, and to the need to redirect aid towards horizontal objectives of common interest, including cohesion objectives. At Barcelona, the Heads of Government reiterated this commitment. "Less and better targeted State aid", they said, "is a key part of effective competition".

The recent editions of the State aid scoreboard clearly demonstrate that so far Member States are on track towards meeting these commitments, although we need to remain vigilant. There is a clear decline in aid levels up to the end of 2001, especially outside the sensitive sectors of agriculture, fisheries and transport, where aid levels have fallen by about 25% between 1997 and 2001. Moreover there has been a significant increase in the proportion of aid devoted to horizontal objectives, such as R&D aid, aid for

SMEs, the environment, employment and training, and a corresponding reduction in the amount of more distortive individual aid, although here the exact picture varies quite considerably between the Member States.

In dealing with individual cases, the present Commission has taken a rather economic approach in conducting its State aid policy. Like no other Commission before it, it has re-oriented its State aid policy toward cases and issues of significance for the internal market and Community industry.

Let me quote as few examples the state guarantees for German, Austrian and French public banks, Deutsche Post, the unlimited State guarantee for EdF or the “shareholder's advance” in favour of France Télécom. What do these cases have in common? They apply State aid rules in areas where this was rather not the case until now.

What have the State aid rules achieved and continue to strive to achieve in these areas? They have supported the opening of these formerly protected activities to competition and an increasing public awareness that the Commission brings "added value". Because State aid control should not be undertaken as an art for its own sake – it should foster competition and competitive markets throughout the Community - for the sake of consumers, a task sometimes too big to be achieved at the national level.

What is therefore the Commission’s role in all of these cases? We have to apply economically solid principles and strive with our State aid policy to create more competitive markets in banking, energy, postal or telecommunication services - all areas that were not really marked by vigorous competition before.

Focusing on economically challenging and important work requires the discipline to set priorities - something where we still can improve. I will come back to this issue in a few moments.

3. THE CHALLENGES AHEAD

In the next section of my remarks I would like to take a look at the challenges which lie ahead. The most obvious, is of course enlargement in May 2004.

The Commission is in the process of actively preparing for the enlargement of the EU. We have already recruited about 40 temporary officials from the new Member States to work on State aid related issues. From May 2004 onwards, the new Member States will immediately be considered part of the larger European market when applying the competition rules, with, as regards State aid, only some very limited transitional arrangements.

Following the completion of the negotiations, the work is now focussing on implementing the transitional mechanism provided for in the Act of Accession and screening the lists of measures proposed by the candidate countries for inclusion in their existing aid lists.

Enlargement will present a challenge both from the substantive and the procedural point of view. In terms of substance, we will need to ensure the application of the State aid rules in economies which are in some respects still different from those of the current Member States, and which have not always yet fully completed the process of transition from centrally planned to market-based economies.

In terms of procedure, the Commission will have to deal with the additional workload created by examining State aid measures in the ten new Member States, working in new Community languages, alongside the existing workload. Rough estimates suggest that enlargement will increase our State aid workload by at least 40 %, and although the budgetary authority will

make some additional resources available, these will be nowhere near proportionate.

However, my greater concern is how to ensure that we build on the successes of the past, and maintain a strict State aid control in the uncertain times which lie ahead.

State aid control does not exist in a vacuum. It has to be seen in the context of the broader range of Community policies, in particular the economic reform agenda. The Lisbon Council has set the very ambitious objective of making the EU "the most competitive and dynamic knowledge based economy in the world". As a key part of this process, the Barcelona Council has, for example, set a target that 3 % of EU GDP should be devoted to spending on research and development. Other European Councils have set new targets for promotion of small business, training and environmental protection.

There are some who consider that there is an inherent contradiction between the Lisbon process, on the one hand, and the Stockholm process of reduction and reorientation of aid on the other. I am not among those. The structural problems of the European economy will not be solved by throwing money at them. Experience has shown us time and time again that the ill-considered use of public money to delay the difficult process of structural reform may in fact substantially harm our competitiveness in the longer term. Thus we cannot and will not allow generalised demands for flexibility to undermine the principle of a strict State aid control.

Nevertheless, we must always be prepared to examine requests from Member States for additional flexibility to deal with specific situations, provided that evidence is available that State aid is an appropriate solution, and will not unduly harm the conditions of competition in the Community.

A series of Council conclusions, most recently under the Danish Presidency at the end of 2002, call for an economic approach towards less and better State aid. The main aim of these conclusions is to develop a broader economic analysis of the effects of State aid by encouraging greater dialogue and exchange of information between the Member States. Member States are invited to consider, before granting aid, whether an intervention in the form of State aid is the most appropriate and effective way to address identified market failures and to continue to develop the use of ex-ante and ex-post evaluations of individual State aid and State aid schemes in order to monitor the effectiveness of aid and its impact on competition.

4. THE SIGNIFICANT IMPACT TEST

For some months now we have been conducting an intensive internal reflection on how to identify aid which is unlikely to produce significant effects on competition while maintaining a strict control of more distortive aid.

As a starting point for the discussion, it seems reasonable that we should give priority to cases where other Member States are more likely to be negatively affected. Conversely, where the negative consequences of a distortion of competition are confined within national or regional borders, there is perhaps less case for a scrutiny at Community level.

Building on this, it seems possible to identify four basic principles which appear to constitute a foundation for distinguishing between important and non-important cases:

1. Other things being equal, the smaller the amount of aid, the smaller the distortion of competition which is likely to result. If the aid amount is

sufficiently small this might be sufficient to qualify an aid as 'of less concern'.

2. Aid to a sector producing non-tradable goods and services would not, directly, shift production away from other Member States. It might, however, prevent establishment of foreign competitors. This risk can be reduced, however, by ensuring that the aid is awarded on non-discriminatory terms.

3. Individual aid is more likely to be retained at company level, particularly when directed at firms with market power. It might favour anti-competitive behaviour and should be carefully assessed.

4. Sectoral aid has greater impact on total industry output and should be avoided in tradable sectors. On the other hand, aid to a competitive sector is more likely to be passed on to consumers and would be of less concern when taking place in a non-tradable sector.

On the basis of these rather general considerations, we are examining the possibility of developing of two different approaches aimed at identifying State measures of lesser concern. The first approach is primarily based on the limited amount of the aid involved and the objectives of the aid. The second approach could be used to cover aid measures of a higher amount, which can still be considered of limited concern if granted in a non-tradable sector and if a number of conditions are met.

4.1. THE APPROACH BASED ON THE LIMITED AMOUNT OF STATE AID [LASA]

Under the first approach relatively small amounts of aid could be considered compatible with the common market under Article 87.3.c of the EC Treaty if certain conditions are met.

- The aid should be linked to costs that are necessary for the achievement of important Community objectives, such as promotion of R&D, protection of the environment, creation of new and better employment, promotion of training and promotion of SMEs.

- A maximum aid intensity would be defined, in the order of about 30 % of the costs.

- A maximum amount of aid to a single company would be fixed. Although we are still discussing detailed numbers, this limit would be substantially above the current de minimis limit of € 100,000 over three years, perhaps in the order of € 1 million within a three year period.

- We would establish a maximum limit for the total amount of aid which could be granted by Member States in this way.

- Last but not least, we would introduce safeguards as to ensure that the aid is not abused.

4.2. THE APPROACH BASED ON THE LIMITED EFFECT ON TRADE [LET]

The second approach builds on economic theory to arrive at the conclusion that certain measures do not affect trading conditions to an extent contrary to the common interest. It applies only to selected economic activities that, by their nature, are unlikely to produce significant cross-border effects. These activities will be defined in a positive list. This, in itself however, would not be sufficient and so additional, specific conditions would be attached in order to avoid negative spill-overs on other Member States. The additional conditions imposed should guarantee that the aid is not of too high amount and that as much as possible is passed on to consumers:

- Aid should be linked to eligible expenses directly incurred in carrying out the activities concerned. The definition of eligible costs would be broad.

- Aid would be limited to a maximum amount to a single company per year. Again we are still discussing detailed numbers, but are considering a figure of perhaps € 3 million a year.

- The aid would have to be awarded through a scheme that is open to all companies willing to carry out the identified activities or, in the case of a single aid, through a tender procedure to ensure that the aid is kept to the minimum necessary.

- Also here transparency would have to be ensured.

I should emphasise that in both cases the measures concerned will (contrary to the de minimis rule) be considered as State aid within the meaning of Article 87 (1) of the Treaty, and will therefore remain subject to notification. However we would envisage simplified procedures, so that the aid could be approved quickly.

These ideas represent a quite radical departure from our traditional approach to State aid control. I am quite sure that they will give rise to a lively debate within the Commission and with the Member States. At this stage they are ideas of the Competition Commissioner and his services. Nevertheless, I hope I am not being unduly optimistic in hoping that it will be possible to conclude these debates within a reasonable time-frame.

5. REVIEW OF THE RESCUE AND RESTRUCTURING GUIDELINES

The new approach I have just illustrated does not mean that the Commission intends to give up its role of guardian of fair competition

within the common market. On the contrary, it shows the will to concentrate efforts and resources on those cases that most deeply hinder the competitive process, and that are most harmful for enterprises, workers and consumers alike. I am thinking here in particular of State subsidies to ailing firms, that is widely considered as one of the most distorting forms of aid. It is not by coincidence that our reflection on the prioritisation of cases has been carried out in parallel with a review of the current rescue and restructuring guidelines.

The current guidelines expire in October 2004, and some recent high profile cases have highlighted some of the difficulties in this area. We are therefore undertaking a detailed review of the current guidelines, with a view to tightening them up and closing some of the loopholes we have identified. Among the key issues which we are currently considering are the possibilities:

1. to apply to rescue aid, like to restructuring aid, the "one time, last time" principle;

2. to ensure that rescue aid is limited to reversible, temporary short-term financial support which is granted only for so long as necessary to put a comprehensive restructuring plan into effect;

3. to ensure that a significant proportion of restructuring costs is borne by private investors;

4. to clarify that the closure of long-term loss-making activities cannot be counted against the level of capacity reduction which is considered necessary as compensatory measure to protect competition;

5. to ensure that restructuring aid is never used to artificially maintain the presence of a company in a market which is in chronic long-term structural over-capacity.

This review will address the main short-comings we have identified in the current guidelines. In addition, however, I think it is necessary to begin a longer-term reflection about the place for restructuring aid in the future. While I accept that there may be a case for short-term rescue aids and for restructuring aid for SMEs, I am deeply sceptical about restructuring aid to large companies. We regularly read in the financial press of large-scale restructurings which take place without public support. The most recent edition of the State aid scoreboard has clearly demonstrated that experience at the level of Member States is very different. While some countries regularly give this aid, others seldom, if ever, find it necessary to do so. Given that such aid produces clear distortions of competition, there is therefore room for doubt as to whether it is really effective in the longer run.

Thus as well as the short-term review of the guidelines for 2004, we should perhaps undertake a longer-term reflection of the future of this type of aid, its relationship with national insolvency laws and rules for the social protection of the workforce of the companies concerned.

6. SERVICES OF GENERAL ECONOMIC INTEREST

Another area of the State aid rules which has given rise to substantial discussion in recent months concerns the status of compensations for the cost of providing services of general economic interest (SGEI).

The long awaited judgement of the Court of Justice in the Altmark case has brought greater clarity to this area. Nevertheless, I believe that the Commission has a duty to try to provide further clarity and to improve legal certainty in this complex area. We therefore envisage to bring forward shortly some new draft texts for consultation. These texts will emphasise that Community law in no way restricts the capacity of Member States to provide high quality public services for their citizens, but rather serves to

prevent harmful abuses, in particular the use of public funds to cross subsidise activities in competitive sectors.

In addressing this complex issue of State aid and SGEI, it seems to me important to distinguish clearly between three quite separate issues.

The first issue is essentially a procedural matter: when does compensation for the cost of SGEI constitute a State aid and therefore need to be notified to the Commission for approval? This is the issue addressed by the Court in the Altmark and GEMO judgements. The main question the Commission must now consider is whether the Member States have sufficient elements to decide whether or not they need to notify, or whether the Commission should give further guidance, for example through an interpretative communication.

The second issue is a matter of substance: under what conditions can the Commission consider that a measure which constitutes state aid is compatible with the Treaty. This issue is not affected by the Altmark judgement. That judgement in no way calls into question the previous law, and practice of the Commission, that aid can be considered compatible with Article 86(2) of the Treaty, provided there is no overcompensation. Here the main question which the Commission must now consider is whether the Commission should give further guidance to Member States on how to avoid possible over-compensation, for example through a framework or guidelines.

The third issue combines procedure and substance: is it possible to envisage an exemption instrument so that certain forms of compensation which do not meet the Altmark criteria, and therefore constitute aid, can nevertheless be considered to be compatible with the Treaty, and exempt from notification.

7. THE FUTURE DEVELOPMENT OF THE EXISTING STATE AID RULES

Because of their fundamental importance, I have emphasised these three major issues of a possible significant impact test, the review of the rescue and restructuring guidelines and services of general economic interest. Nevertheless they form only a part of a major work programme to simplify and modernise the State aid rules, without undermining the principle of a strict control of State aid. Since my Director General, Philip Lowe, will be speaking on this in greater detail this afternoon, I will limit my remarks to a few telegraphic points.

7.1. PROCEDURES AND ENFORCEMENT

Looking first at procedural questions, our State aid procedures are based on solid foundations. We have a clear, and relatively straightforward procedural framework, which is set out in a single regulation, which was itself based on the accumulated experience gathered from many years. The Commission has now approved a draft implementing regulation which is intended to simplify as far as possible the formalities regarding notification and annual reporting by Member States as well as to give transparency as regards time limits and the interest rates for recovery. We will be consulting with Member States over the next few months, with a view to adopting the definitive regulation in the Spring of 2004.

One weak point in our current system lies in the difficulty of ensuring the effective recovery of aid. Community law places an obligation on Member States to ensure effective recovery in accordance with national legal procedures. However, those national procedures do not in general give a high priority to the recovery of illegal aid, particularly when, as is frequently the case, the beneficiary is in financial difficulties.

It is also to deal with these issues, that, as part of the recent reorganisation of DG Competition, I have decided to set up a new unit which will be

specifically charged with ensuring the enforcement of recovery decisions, analysing the barriers to recovery and identifying possible solutions. As well as following recovery cases, this new Unit will be charged with monitoring and enforcing compliance with conditional State aid decisions.

7.2. THE SUBSTANTIVE RULES

As regards the development of the compatibility rules, our guiding principles have been derived from the principles laid down by the European Council: reorientation of aid towards horizontal objectives of Community interest and reductions in the more distorting forms of aid, particularly individual aid.

The Commission has laid down a series of frameworks which cover the main types of horizontal aid. Each of these frameworks sets out the conditions under which aid can be accepted.

For reasons of time, I will not go into details now on all the texts adopted in recent years, but rather pick out two points.

First, we are committed to eliminating unnecessary procedural formalities whenever possible. In the case of aid for SMEs, for training and more recently for employment, the old frameworks have been replaced by block exemption regulations, which eliminate the need for notification by Member States. The Commission is currently finalising a new block exemption regulation which will exempt research and development aid for SMEs from prior notification.

Second, in cases where it can be shown that our rules are too strict and may actually constitute a hindrance to the achievement of the broader economic policy objectives of the Union, we are prepared to take remedial action. A good example is the Commission communication on State aid and risk capital. In that case we were able to establish that there was a gap in the

market provision of capital for high risk company start-ups and that a solution was not available within our existing frameworks. We were also able to show that any risk to competition could be minimised through appropriately designed schemes.

It is clear that a key priority over the next year or so will be the review of the regional aid guidelines. As a result of enlargement the regional aid map of the Community will change significantly. The greater part of the territory of the candidate countries will receive assisted region status. This means that a number of regions within the current Member States will lose their eligibility to receive higher amounts of regional aid under Article 87.3.a of the Treaty, either because their GDP exceeds 75% of the current Community average, or because it will exceed 75% of average GDP in the enlarged Community.

Clearly we have to lay down appropriate transitional arrangements for these regions. We also have to look very closely at the arrangements for the so-called Objective 2 regions, which normally qualify for aid under Article 87.3.c of the Treaty, in order to determine whether we should continue a map-based approach, or whether it would be more appropriate to focus on certain themes such as innovation, the environment or problems of infrastructure. Of course, when undertaking this review we have to take into account the parallel review of the structural fund regulations.

Ladies and Gentlemen, I think that these remarks have shown that we have a busy time ahead, and that real changes are taking place.

Thank you for your attention.