

Perspectives for the EU's state aid policy and role of Member States.

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Summary

I. Introduction (3 min)

(In the Introduction it is mentioned that the speech will deal with a number Commission initiatives which are relevant for the objective of reinforcing State Aid control: the rest of the speech deals individually with each of these initiatives, and underlines when appropriate the role that can be played in the relevant context by Member States/national jurisdictions).

II. Initiatives

1. **Scoreboard and Register (3 min)**
2. **Recovery Policy (13 min)**
3. **Group Exemption Regulations (5 min)**
4. **Environmental Framework (3 min)**
5. **Operating Aid in Shipbuilding (3 min)**

III. Conclusion (1 min)

I. Introduction

It's a great pleasure for me to participate in this State aid forum, which I see very much as an important opportunity to discuss topics of European relevance between the business community and the public authorities.

I am also pleased with the subject I am going to deal with, that is the perspectives for the European Union's State aid policy and the role of Member States, which raises a variety of important and interesting issues. In general, it can be said that the perspectives of the European Union's State aid policy strongly depend on the concrete action which is taken by the European Commission today. Also, the role of Member States has to be stressed in the implementation of State aid policy.

As you are aware, the new Commission is determined to keep a tight control on State aid in all its forms, with the clear goal of reducing even further the

amount of aid granted in the Community. Right at the beginning of his mandate, Commissioner Monti announced that a strict State aid policy was one of his main political priorities. This broader Commission policy aiming at **reinforcing State aid control** together with **modernisation of State aid rules** translates itself in a number of different initiatives which will lead with time to a more effective and transparent European State aid policy.

In my presentation I will deal with those that I consider the most important initiatives undertaken by the European Commission with this aim of reinforcing and modernising State aid control. Clearly, the two objective are strictly linked, as a control can be more effective and can be reinforced also to the extent that the relevant rules are adapted to the world in which they have to be applicable. Also important in this context is the transparency of State aid rules: rules are better to be applied if they are well-known by all those concerned.

In dealing with these questions I will emphasise when appropriate the role that can be played by Member States and national jurisdictions in helping these objectives to be better achieved.

The initiatives I will deal with are, in the order, the very recent ones of the Scoreboard and the Register, the policy on recovery of illegal State aid (and in this context I will briefly refer to the Procedural Regulation), the very recent Block Exemptions, the Environmental Framework, finally the new policy on aid to shipbuilding.

II. Initiatives

1. Scoreboard and Register

As I have said before, the new Commission is determined to keep a tight control on State aid. The global total level of aid should be reduced. This is so because even if overall, aid decreased significantly (from an annual average of 104 billion Euro during the period 1993-95 to an annual average of 93 billion Euro during the period 1996-98), despite this downward trend, in

absolute terms the level of aid remains high. As you know, Prime Ministers Aznar and Blair recently also proposed that aid volumes should be reduced by a certain percentage of (GDP Gross Domestic Product).

This general policy objective will be easier to be fully achieved if the Commission will be actively supported by Member States in this context. In fact, such reductions under State aid rules cannot be achieved under State aid rules alone, because Article 87 of the Treaty does not allow the Commission to act directly on overall State aid volumes and in particular not to reduce them to pre-established levels. Ultimately, authorisation of State aid that is compatible with State aid control rules cannot be refused simply because the Member State concerned has reached a pre-determined ceiling.

Therefore, in order to provide a catalyst for action by Member States, **two further important initiatives** have now been undertaken

which will improve transparency in the control and use of State aid and contribute to increased peer pressure on Member States.

By offering Member States, consumers and other interested parties a user-friendly tool that can provide more detailed information on State aid control policy and the implementation of Commission State aid decisions in Member States, the benefits of State aid control will become more accessible. Moreover a basis will be provided for Member States to evaluate the appropriate level of State aid in the context of their economic policies.

The first of these tools, the State aid **Register**, will contain basic information on all State aid decisions taken by the Commission and summary information on all State aid cases that are under examination. The Register will be available on Internet, contain appropriate search tools and will be frequently updated.

The **Scoreboard** will be a more evaluative tool that, updated once a year, will address

important aspects of EU State aid control and State aid policy in Member States. It will provide a detailed picture of State aid spending by each Member State, inform on compliance by Member States with state aid rules, including the recovery of aid, highlight state aid situations which may need future Commission action under state aid rules; the recent tightening of sectorial rules for shipbuilding and the review of environmental guidelines are examples of such action. Finally, the Scoreboard will contain a part evaluating, as far as possible, the impact of State aid on the Single Market.

The Register will open on the DG COMP Internet site in the coming days and the Scoreboard, by the end of July this year.

2. Recovery Policy

It is important to recall that recovery is not an aim in itself, but is part of a broader Commission policy aiming at **reinforcing State aid control.**

There are clearly **close links between the recovery issue and the Procedural Regulation.**

Both elements are key factors for the modernisation of State aid policy. The procedural regulation is the legal framework for any action. It offers different tools to implement a strong recovery policy, but also puts some limits on what the Commission is legally able to do.

The recovery of aid is also one of the areas where the **relations between Community law and national law** are most explicit. National law, administrations and jurisdictions in the Member States, have an important task to fulfil in the context of recovery. They must ensure the implementation of Commission decisions in a correct (and hopefully quick !) way.

But national jurisdictions have not only a role in the implementation of State aid decisions. They should also offer **remedies at national level against unlawful aid measures**, independently of the Commission's action, in some cases

perhaps even making the latter redundant. These possibilities are still not sufficiently explored.

The possibility to order the recovery of illegal aid, if it is incompatible with the common market, is not provided by the Treaty, but was an idea of the Commission. Today it may appear to be a very obvious solution – indeed, recovery of an incompatible aid is the best possible way to restore fair competition – but given the lack of legal provisions, it was certainly not obvious at the time. This may help to explain why it was not before the middle of the Eighties that the Commission took its **first recovery decisions**. However, the reimbursement of the incompatible aid by the beneficiary was not enough to remedy the distortion of competition. Therefore, in a second step, the Commission started to require recovery not only of the aid amount itself but also of **interests** to be paid from the award of the aid until its effective reimbursement. The Commission decided to apply a uniform

Community system for calculating the interests:
the method of so-called “**reference rates**”.

In all these developments, **the Court of Justice supported the Commission’s policy.**

What is important, in the context of the policy on recovery of illegal aid, is the **effective execution of recovery decisions.** Following established case law, **recovery has to take place in accordance with the relevant procedural provisions of the national law in the Member State concerned.** Differences in the applicable procedures should not necessarily be incompatible with effective recovery, especially since the Court has consistently ruled that national law only applies as long as it does not render recovery practically impossible.

When looking at the Procedural regulation and the jurisprudence, there is no doubt anymore that national law must ensure the reimbursement of the aid. The only question left open is when the reimbursement will take place. Depending on the applicable procedures it may take a long time before the incompatible aid is finally reimbursed.

These **long delays** are often due to the suspensive effect of pending procedures before national courts.

I would however like to underline that the consequences of the frequent delay in the implementation of recovery decisions are considerably mitigated by the fact that interests have to be paid until the date of final recovery. Furthermore, an improvement by the procedural regulation is the provisional recovery injunction, laid down in Art. 11 (2). Commissioner Monti is determined to use the injunction whenever possible.

Another important point I would like to make in the context of the policy on recovery is that the services ensure a **permanent, close monitoring of the follow-up** of recovery decisions.

Furthermore, cases where a Member State refuses to comply with a recovery decision are **systematically referred to the Court of Justice**. Member States have to inform the Commission within two months what action they have taken to implement the decision. If they do not reply,

even after a reminder, it will be proposed to the Commission to seize the Court of Justice. This does not mean, of course, that the recovery is always finished within two months of the decision. As you know, if a Member State encounters unforeseen or unforeseeable difficulties in the implementation of the decision, it must inform the Commission thereof and propose appropriate solutions to overcome the problems. In such situations, which frequently occur, the Commission and the Member State have a duty of co-operation in accordance with Article 10 of the Treaty. The discussion on these - real or alleged - difficulties unfortunately often leads to further delays. However, legally the Commission is bound by the principle of loyal collaboration. It can thus only refer the case to the Court of Justice if the Member State concerned refuses not only to comply with the decision but also to co-operate with the Commission. On the other hand, only a real co-operation can prevent the Commission from seizing the Court of Justice immediately; if the

Member State only repeats certain internal difficulties, which do not justify further delay, and does not make any proposals to overcome the difficulties, this is not what we call "cooperation". Therefore, the Commission will not accept to continue the negotiations and will go to Court. This is what happened, for instance, in the Belgian Maribel case. In this regard, it is also important to mention that the action for annulment which may be lodged against a recovery decision, has no suspensive effect. A Member State is thus not allowed to wait with compliance until the Court decides on the annulment action. Similarly, the Commission does not need to wait for the outcome of the annulment action to lodge an action for non-compliance with the decision - as we have seen in the Maribel case.

There may be cases where even after a judgement of the Court of Justice, confirming that the Member State concerned has not complied with the decision, the Member State still does not implement it. Should this happen, the

Commission will not hesitate to refer the matter a second time to the Court of Justice, this time applying for **penalty payments in accordance with Article 228** of the Treaty. So far, we have not had appropriate cases to use Art. 228, but I would not exclude that it will happen in future. The experience in other fields shows that starting this procedure is in many cases a sufficient deterrent in order to force Member States to comply with the Court judgement. The main problem here is again the delay: since Art. 228 can only be used after a first referral to the Court has lead to a judgement confirming the non-compliance, it can generally only be started several years after the original recovery decision. In addition, the Commission carefully assesses the possibility to make use of the **Deggendorf jurisprudence** in appropriate cases. According to this jurisprudence, the Commission can in its assessment of the compatibility of a new aid, take account of previous incompatible aid measures which the company concerned still has to reimburse. This may serve as an incentive to

accelerate reimbursement procedures in certain cases.

Finally, the Commission is also determined not to accept **circumvention** of the rules by certain constructions set up in order to avoid recovery. I am thinking now of certain cases where a company having to repay incompatible aid, is taken over by another company. If the take-over is constructed in such a way that, for example, the new company escapes from reimbursement, because it has taken over all the assets and liabilities, except the recovery, there is clearly a problem. This and other cases have recently raised heated discussions both legally and in terms of State aid policy. The questions is : should a new buyer of the assets of such a company take over the liability to repay the incompatible State aid as well as the assets? Decisions on cases such as Gröditzer, SMI and Seleco have generated much debate on this point. I am well aware that this issue has given rise to significant concern in various quarters. There is of course a possibility that potential buyers could

be put off from buying companies in difficulty due to worries about hidden State aid liabilities. We recognise and sympathise with such concerns.

It is however important not to forget the context in which this question arises. We are talking here about aid a company has received illegally, aid that is incompatible with the Single Market.

The issue is clearly a complicated one to which there is no simple solution. That is why we are trying to introduce some clarity about when a State aid liability should be transferred to the purchaser of the assets. We hope to increase the legal certainty surrounding the purchase of the assets of companies in difficulty.

Our initial examination of this issue suggests that there are three situations which might justify the transfer of illegal State aid liabilities.

- Firstly, where there is identity of economic ownership on both sides of the transaction. For instance this might occur if a company in difficulty is bought by another subsidiary within the same group;

- Secondly, where a deal has been concluded which transfers some of the liabilities together with the assets, but the State aid liability is not transferred. This is clearly the most complicated situation;
- Lastly, where the tender process for a company's assets has not been carried out according to a fully open, transparent and unconditional bidding process.

Let me be clear: I am not saying that the State aid debt should be transferred with the assets in every case falling into one of the above three categories. I do however believe that these conditions provide a clear justification for the Commission to examine such cases in more detail.

For instance, if a company takes over only those liabilities specifically relating to the transfer of staff together with the assets, we would probably not see a problem. However if all liabilities had been transferred together with the assets, with the sole exception of the liability to repay the state aid, then this might be a case where we would consider that the original recovery decision had been circumvented. Ultimately it is a question of

sensible judgement and final decisions will be based on the merits of each individual case. Let me now say a few words on **the role of national jurisdiction in the context of the recovery of aid**. National courts are involved in recovery cases mainly in the context of the **implementation of recovery decisions**. When a beneficiary starts legal proceedings before national courts, the latter have to ensure the full effect of the Commission's decision, i.e. the immediate and effective recovery. If they have doubts about the application of certain provisions of national law, they should get clarification from the Court of Justice or contact the Commission, in accordance with the notice on co-operation between national Courts and the Commission in the State aid field.

National courts may, however, also be confronted with recovery issues at a much earlier stage and in the absence of a Commission decision. As a matter of fact, any unlawful aid can also be the subject of an action before national courts. Since **Art. 88 (3)** is a provision

with **direct effect**, any act implementing aid in breach of this article, is invalid and a final Commission decision cannot have the effect of regularising the infringement. National courts must thus preserve until the final decision of the Commission the rights of individuals against infringements of Art. 88 (3), and draw all the consequences of the illegality. In particular, the Court has held that national courts may have to take interim measures, such as ordering the suspension or reimbursement of unlawful aid. It is regrettable that this possibility, clearly established in the SFEI case is so seldom used. In general, it appears that the involvement of national courts in State aid matters has not developed very much so far. Moreover, in most Member States, enterprises seem to be still very reluctant to use national action against infringement of the State aid rules, even though the Court developed a clear and standing jurisprudence concerning the powers and tasks of national courts.

Although the legal systems of all Member States provide **actions for judicial relief** which can ensure the protection of enterprises against unlawful aid to their competitors, these instruments are **largely underused**. In fact, the total number of reported cases in which national courts have applied Art. 87-88 was limited to 116. In some Member States (Denmark, Ireland, Portugal) there had been no single case, while France, Germany and Italy together account for 75 % of the total number of cases.

Moreover, the vast majority of the 116 reported cases (75%) did not involve actions started by competitors, of the type referred to in the notice on co-operation between the Commission and the national courts. In fact, more than half of the 116 cases dealt only indirectly with State aid. They concerned actions of companies against the government in order to avoid the imposition of a tax or other financial burden with the argument that other companies were exempt from that tax and thus received State aid. Only a small number

of cases was brought by competitors and led to the envisaged result.

This situation is due probably to the lack of transparency which the State aid rules suffered from for a long time, despite the efforts already undertaken by the Commission, and to the limited knowledge of lawyers and national judges which results from it. In addition one might assume that national judges are rather reluctant to apply the sometimes complex EC rules to a national set of facts in a manner which may have far-reaching consequences for the enterprises concerned.

The rather poor results achieved so far have led to some critical comments from the side of industry and lawyers. I personally would not be pessimistic. Given the fact that generally speaking appropriate instruments do exist at national level, it seems to me that one should encourage all parties involved to make use of them. Of course, we all know that national jurisdictions are hesitant to apply EC law and that cross-border litigation involves many

difficulties for a competitor (language, foreign legal system, costs, lack of knowledge of the rules by national judges). But this is inherent to the direct application of all EC law at a national level. Improving this is certainly a process which takes time, but the final direction in which we evolve should be one of shared responsibility, a two-pillar system based on the Commission, on the one hand, the decentralised application of EC State aid law by national courts, on the other. I therefore believe that the Commission should continue its efforts to improve transparency and better knowledge of the rules. The procedural regulation, adopted by the Council on 22 March 1999 is an important step towards this objective. The newly adopted group exemptions will also contribute to the aim of increased transparency. Group exemptions will make the role of national courts even more important, as they will be directly applicable. If third parties suspect that aid does not fulfil the conditions set out in the group exemption, they may seek relief before national courts.

These examples show that decentralised forms of State aid control are not only possible but already exist, although it appears that there is still a lot to be done before national courts will fully use the powers they have.

3. **Group Exemption Regulations**

As I just indicated, the newly adopted group exemptions will also contribute to the aim of increased transparency. **Group exemptions will make the role of national courts even more important, as they will be directly applicable.** If third parties suspect that aid does not fulfil the conditions set out in the group exemption, they may seek relief before national courts.

Group exemption regulations have been adopted **for certain categories of horizontal aid** (those types of aid which usually can be authorised without problems) from the obligation of prior notification and authorisation. In a first phase three regulations have been prepared: a block exemption for aid to SME and one for training aid, and a *de minimis* regulation.

As you know, the Commission has until now laid down the criteria for the compatibility of aid with the common market in frameworks and guidelines. Under frameworks and guidelines, all aid must be notified (art. 88 (3) of the Treaty) and the Commission examines whether the notified project complies with the criteria set out in the frameworks.

Why has the Commission changed this system for certain types of aid ? Over the years the Commission has been able to define and publish precise criteria of compatibility. In areas where the conditions of compatibility are clearly established, it can be seen that Member States usually notify aid projects which comply with the relevant frameworks and guidelines. Both Member States and the Commission have acquired experience with the application of the conditions. Under these circumstances, the added value of a Commission decision confirming that the published compatibility criteria have been met, is very limited. The formalism of carrying

out notification procedures in these cases has a substantial impact on the Commission's resources (decisions to be taken every year) and obviously also on those of the Member States. Moreover, it prevents the Commission from concentrating on larger, more complex and more distorting cases.

In terms of **simplification of procedures**, group exemption regulations will not only have the advantage of liberating the Commission of a large number of notification procedures in routine cases. They will also free the Member States from the administrative burden of notification and allow them to award aid, which is covered by an exemption, immediately and without a standstill period. Outside the scope of the group exemption regulations, the traditional notification procedure will continue to apply.

State Aid control is certainly the area where there are the clearest limits to decentralisation, in particular with regard to involving national authorities. Issuing group exemption regulations and regularly supervising their application (e.g.

through reporting mechanisms) must therefore remain in the hands of the Commission. However, due to their direct applicability, group exemption regulations will grant more responsibility to national bodies. National authorities will have to check themselves whether their aid schemes are within the limits of a group exemption regulation. And national courts, upon actions brought against the aid, will be able to control and dismiss the action if they are convinced that the conditions of a group exemption regulation are fulfilled. In this sense, block exemption regulations contain also a limited **element of decentralisation**.

A *condicio sine qua non* for a system of group exemptions is the set-up of an efficient **control system**, in order to make sure that the group exemptions do not weaken State aid control. The Commission depends here in the first place on information from the Member States. The regulations contain therefore several reporting obligations, which should find a balance between on the one hand the need to ensure transparency

and monitoring, on the other hand, the administrative burden for Member States. The following instruments of monitoring are foreseen:

- first, Member States have to send a short standardised notice to the Commission whenever they implement a new aid or aid scheme under the group exemptions. These short notices will be published in the OJ.
- secondly, records containing information on all exempted aid must be kept for 10 years. This should allow the Commission to request information on exempted aid (e.g. following a complaint). Should the aid not be covered by the exemption regulation, it will be examined like any unlawful aid and if it is incompatible, recovery can be ordered.
- finally, Member States shall provide annual reports on exempted aid. The annual reports are comparable to the ones already required under the present system for all aid schemes.

Apart from these reporting obligations, the current possibilities of control continue to exist (complaints, examinations of unlawful aid, ...).

In addition the group exemptions create possibilities of control at national level. National jurisdictions can examine whether aid was covered by a group exemption or not. (if yes, no problem; if no: recovery can be ordered on the basis of the SFEI-jurisprudence of the Court of Justice. However, only the Commission is competent to decide on the compatibility of the aid).

4. Environmental Framework

While for certain areas, group exemptions have been prepared, for other types of aid and in particular for environmental aid, this did not seem appropriate at this stage. A new Framework has been recently adopted and is going to enter into force in the coming days. The interest of this Framework in the context of our discussion here is twofold. On the one hand, it is interesting as it constitutes a step forward in the achievement of greater transparency of State aid rules and its modernisation process. Indeed, the new framework is supposed to be more adapted to

reality than its previous version. On the other hand, this Frameworks represents a good example of the sometimes difficult operation of limiting State aid.

Let me briefly indicate two items are of particular importance in this Framework: aid to renewable energies, and fiscal derogations.

Aid to renewable energies: as it is a Community policy that to favour the increase in production of renewable energies in Europe, it is recognised that State aid may encourage such production. Therefore, aids which would not be allowed under normal conditions, could be accepted under the new rules on environment. The framework gives Member States the possibility to grant aid to compensate for the difference between the production cost and the market price until the total depreciation of the plant. The aid can also cover a fair return on capital if necessary. This means that the aid can cover 100% of the eligible costs.

Fiscal Derogations: Member States can decide to introduce a tax for environmental reasons, for instance in case of CO2 emissions. In the meantime, Member States may grant derogations for specific industries. Such derogations may constitute State aid, and need to be approved by the Commission. The Commission in the first place intended to limit such derogations to a period of five years. However, after discussion with Member States, and you know that Denmark was one of the Member States more keen on this point, the Commission has come to the conclusion that longer periods (i.e. ten years) could be authorised.

Last but not least, I will now make a reference of the progress which has been recently achieved by the Commission as concerns aid to shipbuilding.

5. Operating aid in shipbuilding

As you know, operating aid to shipbuilding has been authorized by the Community since the early 1970s. For many years the aid rates were exceptionally high. In the 1987 a tighter, more

restrictive policy was introduced, but the aid rate was still 28%. The aid ceiling for operating aid was then gradually reduced, from 28% in 1987 to 9% from 1992 onwards. A level which stayed unchanged for many years.

Authorization of operating aid in shipbuilding became however increasingly questionable, as in particular authorization of this type of aid had not resulted in bringing solutions to the problems incurred by the sector.

The Council therefore decided in 1998 to authorize two last years of operating aid, expiring as of 1 January 2001. The long story of operating aid thus ended a few weeks ago. The final abolishment of operating aid, although decided in 1998, did however not take place without a certain debate.

In the background looms the South Korean yards, which have sharply increased their market shares in the last few years (albeit mainly at the expense of Japanese yards), and which have contributed to the depressing prices on new ships. European

yards claim that continued operating aid is necessary to protect them from the alleged unfair competition from Korean yards, benefiting from past and possibly current subsidies.

The Commission recognises the Korean problem but is of the opinion that the operating aid has not been a solution to it. To handle the Korean problem the Commission last year proposed that if no negotiated solution can be reached with Korea, the Commission will report to the Council by 1 May 2001, proposing to bring a panel against South Korea in the WTO and to establish a defensive temporary support mechanism specifically designed to counter unfair South Korean practices for a period necessary for the conclusion of the WTO procedure.

This mechanism would be limited to those market segments where it has been demonstrated that EU industry has been directly injured by unfair Korean trade practices.

The Council on 5 December welcomed the Commission's determination to tackle the

problem of unfair Korean competition and took note of the Commission's proposals in this regard. The Council underlined that implementation of the temporary support mechanism, under Commission supervision, must not result in distortion of competition within the European Union.

III. Conclusion

Let me conclude with a positive note on the progress achieved by the Commission in the field of State aid. Efforts have been deployed in order to increase transparency and therefore predictability of decisions, and to reinforce State aid control. The last objective of limiting as far as possible the total aid volume in the Community is always kept into mind.

Member States have been so far a little reluctant to help the Commission in achieving these goals, although this may have been partly due to lack of transparency of the rules.

I am confident that Member States and national jurisdictions will increasingly assist the Commission in achieving these goals, by auto-limitation of the

number of aid granted, by virtue of the applicability of the new block exemption regulations and by helping the Commission in its recovery policy.