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**After the State Aid Action Plan:**

**– the EU's new State Aid framework**

EU State Aid Summit

State Aid Policy, Procedure and Enforcement through the Economic Crisis and  
Beyond

C5 Business Information in a Global Context

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Ladies and Gentlemen<sup>1</sup>,

EU State aid control has moved to the top of the agenda of the European Commission, as the financial and economic crisis has deepened and Member States rushed to support their banking sectors and their real economy during the resulting credit squeeze.

Inevitably, the crisis—and the State aid measures to counter it—will dominate the agenda of this conference. I will touch on these aspects more briefly because they will be discussed extensively by others. Instead, during this opening session I would like to take a view beyond the crisis. How has the Community's State aid control evolved and what is on the horizon?

*[The State aid reform framework—the State Aid Action Plan 2005 - 2009]*

Let me therefore go back to the roots of current reform. The roadmap for reform was set back in 2005 by the SAAP—the EU's State Aid Action Plan announced at the time<sup>2</sup>. We are now concluding this comprehensive reform project successfully before this summer break—in spite of the toll taken by the financial and economic crisis on our resources.

The **reform road map** was set in the SAAP to substantial detail. The aim was to fundamentally review and modernise the European Commission's practices in reviewing State intervention in Europe's market place—as far

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<sup>1</sup> The author is Deputy Director General with special responsibility for State aids at DGCompetition, European Commission (until July 2009). The statements made in this paper represent the personal opinions of the author

<sup>2</sup> See [http://ec.europa.eu/competition/state\\_aid/reform/reform.html](http://ec.europa.eu/competition/state_aid/reform/reform.html)

as covered by the Commission's mandate under Article 87 of the EC Treaty.

This fundamental review and the resulting roadmap was spurred by the need to align State aid support by EU Member States more on the general Lisbon reform agenda of the European Union. One may say that the State Aid Action Plan integrated EU State aid control into mainstream EU policies. At the same time, it set out a detailed programme, along three basic principles: **better targeting** of aid by EU Member States; **better governance** in controlling state aid, **more accountability** with regard to all parties involved in the process.

For the first time in fifty years of EU State aid control, the SAAP aimed at a systematic clarification of the Commission's practice in assessing compatibility of aid under Article 87(3), by what came to be called the **Refined Economic Approach**. And it promised **better prioritisation** in the Commission's review practice, more **simplification** of procedures and a **clarification of rights** of parties.

How far have we stood up to these promises of reform made back in 2005?

*[The Refined Economic Approach—the Balancing Test]*

Let me start with the very basis of the clarification process—the **balancing test**.

The refined economic approach, as it was first developed in more detail in the Research/Development/Innovation Framework of 2006, in essence puts three questions:

- Is State aid the appropriate instrument to address the problem targeted?
- Can market failure and incentive effect be proven?
- Is the State intervention proportionate?

Any distortion of competition and effect on trade must be limited. **On balance**, the measure must not be contrary to the common interest of the Union.

The test therefore **weighs the positive effects** of the aid measure **against the negative effects**, as the very basis for a consistent rationale of the compatibility analysis under Article 87(3).

The Commission's thinking on the refined economic approach has now been translated into established practice. The Commission has summarised its case practice to date and its interpretation in a Staff Working Paper published for consultation on DGCompetition's website in May ("Common principles for an economic assessment of the Compatibility of State aid under Article 87(3)"<sup>3</sup>). In parallel it is issuing additional guidelines for the assessment of certain types of aid under the refined approach, such as for regional aid for large investment projects (the so-called LIPS)<sup>4</sup>.

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<sup>3</sup> [http://ec.europa.eu/competition/state\\_aid/reform/economic\\_assessment\\_en.pdf](http://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf)

<sup>4</sup> European Commission press release "State aid: Commission adopts guidance on in-depth assessment of regional aid to large investment projects", IP/09/993, 24 June 2009; see [http://ec.europa.eu/competition/state\\_aid/regional\\_aid/regional\\_aid.html](http://ec.europa.eu/competition/state_aid/regional_aid/regional_aid.html)

***[The New Approach in practice—guidelines and frameworks]***

The new more methodological approach to assessment of aid has resulted in the issuance over the last three years of a number of assessment frameworks and guidelines providing legal certainty for the broad application of the new methodology. The resulting revision of State aid rules has resulted in:

- the issuance of the SGEI (Services of General Economic Interest) Exemption Decision and Framework of 2005 that clarified under which conditions public intervention in these areas falls under Article 86(2) and not under Article 87, and how the Commission will assess such measures,
- The Risk Capital Guidelines, the Regional Aid Guidelines and the R&D&I Framework of 2006. The De minimis Regulation clarified that minor aid amounts (200 000 Euros over three years) would not be considered by the Commission as aid falling under Article 87(1),
- The Environmental Guidelines (including Climate Change aid) and the Guarantee Notice of 2008. The latter clarified under which conditions public guarantees can be considered as aid free,
- And, as the major Omnibus Regulation of the reform, the General Block Exemption of 2008 which put under a single umbrella all existing block exemptions and extended the concept of block exemption to a number of new areas.

With the process of adoption by the Commission of the new draft broadcasting guidelines (covering licence fees and other aid to public service broadcasters) and the new draft guidelines for aid for rapid deployment of broadband networks well ahead and likely before Summer break, the new guidelines / frameworks will cover a substantial part of State aid practice<sup>5</sup>.

The common denominator of these new generation guidelines/frameworks is the use of acceptable aid intensities as proxies for a standard assessment of cases in the fields concerned, with the full detailed assessment under the refined economic approach reserved for those projects that do not fulfil the conditions of the standard assessment as defined in the guidelines. This establishes in practice a system of proxies and safe harbours that rationalises the application of the Refined Economic Approach and provides legal certainty for application by both Member States and the Commission's services.

### ***[Simplification by Block Exemption]***

The same method has been used in extending the method of block exemption, as incorporated now in the General Block Exemption Regulation. For measures falling within the definitions of the Block Exemption Regulation the Commission waives the requirement of notification of the aid to the Commission, as long as aid remains within the

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<sup>5</sup> For details see [http://ec.europa.eu/competition/state\\_aid/overview/index\\_en.html](http://ec.europa.eu/competition/state_aid/overview/index_en.html); see also Vademecum on State aid rules [http://ec.europa.eu/competition/state\\_aid/overview/index\\_en.html](http://ec.europa.eu/competition/state_aid/overview/index_en.html); and Handbook on State aid rules for SMEs [http://ec.europa.eu/competition/state\\_aid/studies\\_reports/sme\\_handbook.pdf](http://ec.europa.eu/competition/state_aid/studies_reports/sme_handbook.pdf)

thresholds defined in the regulation. Such aid therefore is subject to control of compliance with the conditions set in the Regulation by the Member States themselves—though the Commission has maintained certain reporting requirements of Member States. In practice, this is resulting in a very substantial decentralisation of implementation of State aid control from the Commission to the Member States. The General Block Exemption Regulation (GBER) as issued in August 2008<sup>6</sup> now covers 26 measures as compared to only 10 under the pre-existing block exemptions (now absorbed into the GBER), inter alia:

- regional aid: investment aid and newly created enterprises,
- SME investment and employment aid,
- Aid for environmental protection,
- Aid for consultancy and participation in fairs (SMEs),
- Aid in the form of risk capital,
- Aid for research, development and innovation,
- Training aid,
- Aid for disadvantaged or disabled workers,

Within the limits of the conditions set in the GBER, a large amount of aid in these categories is therefore now exempted from the notification requirement—a substantial simplification. However, this is an **exemption from the requirement of notification to the Commission—not from the rules** as such.

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<sup>6</sup> Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation); OJ L 214, 9.8.2008, p.3)

With the General Block Exemption we have now gone to the limits of simplification through exemption from the notification requirement. Any further enlargement of the range of measures to be exempted from notification would first require a change of the Enabling Regulation<sup>7</sup> by Council—the legal base for the issuance by the Commission of block exemptions.

***[Simplifying notification procedures to the Commission: the new Best Practice Code and the new Simplified Procedure]***

For the time being, further simplification therefore must concentrate on the simplification and streamlining of procedures of notification of aid to the Commission where this notification remains required.

The Commission therefore adopted in May the so-called Simplification Package which will enter into force on 1st September:

- A **Notice on a simplified procedure** aimed at a substantial rationalisation of the process wherever we can undertake a standard assessment of measures notified to the Commission,
- A **Best Practice Code** for streamlining the procedures for the remaining more complex cases

The financial and economic crisis cases will continue to run under specific fast track procedures.

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<sup>7</sup> Council Regulation (EC) No 994/98 of 7 May 1998



### *The Best Practice Code*<sup>8</sup>

The objective is to improve the quality of notifications before the Commission and to shorten the handling of the procedures by better **pre-notification contacts** between the Commission and the notifying Member State and establishing deadlines through the new **Mutually Agreed Planning procedure (MAP)**. At the same time, a more predictable procedure for complaints is introduced.

The aim is to progressively establish a streamlined procedure with deadlines, similar to the streamlined process established under the EU's merger procedure. The main instrument will be the newly created Mutually Agreed Planning, MAP, procedure. In a first stage, the first phase investigation should be shortened from the current effective six months average to 2 – 4 months, and the full investigation period (comprising both preliminary investigation and second phase investigation after formal opening) in complex or conflictual cases to 18 months in total.

### *The Simplified Procedure*<sup>9</sup>

The simplified procedure should progressively cover all cases that fall under a standard assessment—by far the majority of the around 400 decisions which we are currently taking per annum. This means in terms of eligible categories of aid:

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<sup>8</sup> Notice from the Commission – Best Practices Code on the conduct of State aid control proceedings, adopted on 29.04.09, [http://ec.europa.eu/competition/state\\_aid/reform/reform.html](http://ec.europa.eu/competition/state_aid/reform/reform.html)

<sup>9</sup> Notice from the Commission on a simplified procedure for treatment of certain types of State aid, adopted on 29.04.09, [http://ec.europa.eu/competition/state\\_aid/reform/reform.html](http://ec.europa.eu/competition/state_aid/reform/reform.html)

- Cases covered by safe harbours of guidelines, such as aid for innovation clusters, risk capital schemes, etc. as far as not falling under the GBER,
- Cases where we have at least three consistent precedents and therefore a settled case practice, such as aid for theatres, dance, music, and also rural broadband deployment,
- Prolongation or modification of existing schemes.

We will need safeguards. The Simplified Procedure will not be applicable where substantial concerns are raised by Third Parties; illegal aid has still not been recovered (the so-called Deggendorf rule); incorrect or misleading information has been provided; or where the Commission services face novel legal issues.

Both the Best Practice Code and the new Simplified Procedure will be a revolution in EU State aid practice. While we are currently covering far less than 10% of decisions under a simplified procedure<sup>10</sup>, we aim at assessing 30% and more over time under the new procedure. Again, in this field we are importing the experience from the streamlined application of the EU merger procedure where at times up to 70% of cases have been processed under the simplified procedure established there.

Under the new simplified procedure the Commission will issue short form decisions; improve transparency, by publishing the notification for comment by Third Parties; and ensure the rapid processing of

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<sup>10</sup> as now established for a very limited number of prolongation of existing schemes in Art 4 Regulation 794/2004

straightforward cases, with a one month deadline for decision after the date of notification.

### *Simplification works*

Simplification will not be an easy task. We should not forget that currently we have to ask for modification of aid submissions by Member States in more than 50% of cases, in order to bring the aid measures in line with the rules.

We will therefore depend on the quality of pre-notification contacts with the Member States and on the quality of the notifications themselves if we want simplification to succeed.

But simplification can work. In 2008, out of 1000 schemes and ad-hoc measures regarding State aid in the Community, 60% were dealt with under the block exemptions by the Member States, with no notification required; 40% had to be filed with the Commission—inverting the ratio of 40%/60% of two years before. In 2008, nearly 200 measures were already dealt with under the new General Block Exemption Regulation.

### *[Clarification of Rights]*

Let me make a last point on procedural reform—the clarification of rights. We will guarantee under the Best Practice Code a more rapid and transparent handling of complaints. The Commission will inform more rapidly on the priority status it can give to a complaint and its intention to pursue a complaint (after two months) and on its basic position (within one year).

As an alternative route, we have issued in March the Notice<sup>11</sup> on the enforcement of State aid rules by national courts which substantially clarifies rights of complainants before national courts. Enlarging the possibilities for private enforcement could be a decisive step forward in decentralising implementation of state aid control and of handling of complaints—as in other fields of competition law, such as antitrust.

With the issuance of the Notice we have made a major step forward in the clarification of rights of private parties and of national courts in this area. We have given more guidance on the national courts' abilities to protect individual rights in this area; on the recovery of illegal state aid from the beneficiary; and on the conditions under which competitors can ask for interim measures.

We are also intensifying the cooperation between national courts and the Commission in the area. The Notice establishes an alternative way of complaint for complainants that are damaged by illegal state aid—besides the complaint route to the Commission.

With the simplification package, the further clarification of the refined economic approach and the necessary guidelines, frameworks and the General Block Exemption now in place, we have completed the programme set forth in the State aid Action Plan.

Comes the financial crisis....

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<sup>11</sup> Commission Notice on the enforcement of State aid by national courts, OJ C 085, 09.04.2009, p.1

*[Autumn 2008: The crisis framework]*

As I have said, the dominating topic since autumn of last year are the enormous anti-crisis measures that have been taken by Member States in the context of bank bailouts and recovery programmes—and reviewed, and often adjusted, by us.

The details will be discussed in other panels at this Conference. Let me therefore only make here some general remarks.

From a State aid point of view, the main decision to be taken in Autumn of last year was to apply for the first time **Art 87(3)(b) “serious disturbance of the economy of a Member State** “—never applied before except for Greece in the eighties. After Lehman Brothers’ default, there was immediate consensus in the Commission that this was the time to apply this “nuclear option” of European State aid law. It opened the gate for crisis aid measures widely. The very purpose was to give Member States the possibility to face the very real danger of a banking meltdown and a subsequent deep crisis of the economic system as a whole.

But use of Article 87(3) (b) also allowed maintaining State aid discipline within the framework set by this Article—instead of the alternative of a temporary suspension of State aid rules altogether, as requested by some at the time. The Commission established very quickly a new framework for State intervention in the banking sector under the Article—with the Banking communication, the Recapitalisation communication and the

Impaired assets communication<sup>12</sup>; and a new framework for crisis measures in the real economy, with the Temporary Framework<sup>13</sup>, also on the agenda of this conference. We have maintained principles while allowing Member States to intervene rapidly and efficiently in the banking and the real economy crisis, but we have managed to keep return to market conditions in the focus of all—measures under Article 87(3) (b) are by their very nature temporary. We established **new fast track procedures** which allowed screening cases and taking decisions in record times, measured often in days and weeks, instead of months.

It remains that the level of **total State intervention in the crisis is breathtaking**—in Europe as in the United States. For the European Union alone, we had screened under the new aid frameworks as of end March total aid measures summing up to a volume of 3 trillion EUR for the financial sector alone<sup>14</sup>—2.3 trillion for financial guarantee schemes, 300 billion for recapitalisations schemes, around 400 billion on other rescue and restructuring programmes.

In relation to total GDP of the European Union total potential aid volume authorised corresponds by now to **near 30% of GDP**—even if the real aid element will be substantially lower. This compares to a mere 0.5 % of

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<sup>12</sup> Communication from the Commission – The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ C 270, 25.10.2008, p. 8 ("the Banking Communication"); Communication from the Commission – The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, OJ C 10, 15.01.2009 ("the Recapitalisation Communication"); Communication from the Commission on the Treatment of Impaired assets in the Community Banking Sector, OJ C 72, 26.03.2009 ("the Impaired Assets Communication")

<sup>13</sup> Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis ("the Temporary Framework"), OJ C 16, 22.01.2009, p.1. The consolidated version, integrating the amendments adopted by the Commission on 25.02.2009 is published in OJ C 83, 07.04.2009, p.1

<sup>14</sup> State Aid Scoreboard – Spring 2009 Update, Special edition on State Aid interventions in the current financial and economic crisis, COM(2009) 164, 08.04.2009

GDP total aid volume authorised for the whole of the previous period, according to last year's State aid scoreboard. It shows the **new dimension** that we have crossed in State aids with the financial and economic crisis measures.

The ability of our teams to cope with the screening of these measures in a new framework in record time was based on the successful reform of State aid control launched with the State aid action plan. Let me quote Competition Commissioner Kroes "State aid reforms since 2005 have ensured the system is fit to meet the tests of this crisis;...Now is not the time to dismantle the state aid system or give up the benefits of European integration and cooperation".

### *[What next?]*

More on crisis measures will be discussed during this conference. Let me leave you here with some thoughts on what might come next.

It would be the wrong response to the crisis to demolish the state aid framework which has been built up over the last fifty years and modernised over the last four. We will see the completion of the reform framework soon, with the guidelines on public broadcasting brought up to date and with the new guidelines on aid for broadband investments currently in public consultation<sup>15</sup>. We are also likely to see soon a decision on the extension of the current Rescue&Restructuring guidelines which otherwise would expire by the end of the year.

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<sup>15</sup> Revised Draft Communication from the Commission on the application of State aid rules to public service broadcasting, 8.4.2009; Draft Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks, 19.5.2009. See [http://ec.europa.eu/competition/state\\_aid/reform/reform.html](http://ec.europa.eu/competition/state_aid/reform/reform.html)

However, after the financial crisis, the State aid world can no longer be the same. We will need a deeper reflection on the role of State aid control in the overall policy framework of the European Union and its objectives.

*How to ensure exit from State aid after the crisis? How to deal with restructuring in the financial sector?*

One immediate reflection will be how to exit from the current deep State intervention in the financial sector, once the crisis passed. Together with the Member States, we have been successful in preventing a financial melt-down but there is now a huge volume of State aid out there. The task is to bring the sector back to normal market conditions, in a future post-reform re-regulated financial market. Restructuring distressed banks in a sound manner relating to the specific circumstances of the financial sector is at the heart of such a strategy and painful decisions will have to be taken based on equal treatment of all. Commissioner Kroes has announced that we are working on a communication on the modulation of restructuring rules to apply to the sector. And we will have to ensure that restructuring in the real economy sectors will take place in a socially acceptable manner.

*How to adjust State aid rules to the future transformations: The energy and climate change challenge*

Reflecting on the direct consequences of the financial crisis on our future concepts for State aid will be one major task. A broader reflection on how Member States view the future role State aid in their economies is another. In the overall framework of future EU and Commission policies, State aid control will have to play a new role. We must find the right balance between market mechanisms and State aid in transiting to the new low



carbon economies, once the climate change package enters fully into force by 2012. We will have to define the role of State aid control on the transition to open markets, such as the energy and postal markets. The Commission has in the past developed concepts for allowing adjustment aid for facilitating transition to open markets—such as the “stranded cost” approach in the electricity sector. Building on these concepts, more reflection will be needed. Once the crisis past, the need for market reforms and open markets as the only long-term base for sustainable growth will come back to the agenda, albeit in a different form and with more attention to the right level of regulation.

*How to make the procedural reform package work?*

And of course, an immediate task is to make the procedural reform work—both Best Practice Code and Simplified Procedure. We have the framework in place as I have shown but it must be made functioning.

### ***[Conclusion]***

State aid control is at the crossroad of State intervention and the market economy. This means that State aid control futures will remain a challenge. I will leave my position of responsibility for State aid operation in the Commission’s Competition DG by summer break and clear my desk. But I am sure that the Commission’s State aid teams will find lots of interesting files on their desks in autumn on their return.

