

NEW CHALLENGES FOR STATE AID POLICY

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Ladies and Gentlemen,

Introduction

I would like to begin my remarks this morning by thanking very sincerely the organisers of today's forum for the initiative they have undertaken in establishing the European State Aid Law Institute, as well as a new academic journal, the European State aid Law Quarterly.

For too long the field of State aid has been regarded as the poor relation of competition law, perhaps unworthy of serious academic study because political considerations have dominated. Whether or not this was true in the past, the situation has changed substantially in recent years as the result of the adoption of a series of new regulations, governing both procedures and block exemptions for specific categories of aid. This trend will probably continue. I have recently brought forward proposals to block exempt research and development aid for small and medium-sized enterprises.

This means that responsibility for the enforcement of State aid law is evolving. Until the 1990's, the Commission had a virtually exclusive role, of course under the control of the European Court of Justice and the Court of First Instance. Today the national Courts have a much greater role to play, whether in deciding a particular measure is indeed an aid, or in determining whether an aid meets the conditions of a block exemption regulation, or again, in ensuring the enforcement of a recovery order.

All of this suggests to me that State aid law has now come of age. Efforts to increase awareness of that law, not only at European level, but more specifically at national level, can only be welcomed by the Commission.

General approach to State aid control

When I was first appointed as competition Commissioner, I emphasised, in particular in discussions with the European Parliament, 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, calling as well for aid to be targeted towards identified market failures. "Less and better targeted State aid", they said, "is a key part of effective competition".

One of the innovations introduced in recent years in order to ensure greater transparency in the State aid field has been the State aid scoreboard. The most recent edition of the scoreboard, adopted last April, covers the trend in aid levels up to the end of 2001. This shows that the overall volume of State aid, as a percentage of GDP has continued to decline in 2001, although less sharply than in previous years. In 2001, the total amount of aid granted was € 86 billion, or just slightly below 1% of GDP, compared with € 102 billion in 1997.

Outside of the specific problem areas of agriculture, fisheries and transport (in particular the railways), the decline in aid levels has been even more notable. In GDP terms, the overall level of aid has declined from 0.58% of GDP in 1997/99 to 0.43% of GDP in 1999/2001, a fall of over 25%. 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.

In seeking to reduce overall aid levels in general, and the more distortive aids in particular, the Commission essentially has two different approaches available, the use of general policy instruments, such as regulations, guidelines and frameworks, which I shall come back to, and through the treatment of specific cases.

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, that means to instances "where the Commission can really make a difference" or bring "added value". It has tried not be burdened down with issues and cases where this is not the case.

Let me quote as few examples the state guarantees for German, Austrian and French public banks, capital transfers to Landesbanken in Germany, 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 not the case until now.

What have the State aid rules achieved and continue to strive to achieve in these areas? A general opening of these formerly protected activities to competition and an increasing public awareness that the Commission brings "added value" in bringing this forward. 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 - to 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 the above-mentioned 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.

Does the Court follow the Commission's approach?

Let me come to the issue of Court scrutiny as far as our new approach is concerned. In some cases, such as the West LB Case, the Court of First Instance has actually endorsed the general approach taken by the Commission, even if we have not always got all the details right.

On 6 March 2003, the Court of First Instance has endorsed our economic approach. The Court confirmed all the major arguments the Commission had set forth in the decision adopted in July 1999. The Court held that the "market economy investor principle was

not limited to undertakings in difficulty but allows the Commission to look at the State's behaviour even when investing in a "healthy company".

This means that the Court of First Instance allowed the Commission to innovate its approach, should market circumstances require it to do so. The Court held that, even if we had not previously applied the "market economy investor principle to a healthy undertaking, this did not mean that we could not do so if a State's investment created a distortion of competition".

In other cases, such as Stardust, the Courts have told us that we have got it wrong, and we have had to learn from that experience and draw the necessary conclusions for future cases.

There are those who seek to portray such judgements as setbacks for the Commission. I have to say that I do not see it that way. State aid control lies at the interface of law and economics. Given the role of the Commission as guardian of the treaties, and also of the common interest, I consider it entirely proper that in justified cases the Commission should explore the limits of the law to deal with measures which create clear and important distortions of the conditions of competition. In that sense I would be more concerned if the Courts never over-ruled the Commission's decision, because that would probably imply that we were being too safe, too conservative, in our work.

The challenges ahead

This brings me to the next section of my remarks, in which 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. Already this month the State aid services of DG Competition have recruited a first batch of temporary officials from the new Member States. 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 about 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 ambitious objective of making the EU “the most competitive and dynamic knowledge based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.” 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 innovation, small business promotion, for training and the environment which require national expenditure in these sectors to increase significantly and which lead to calls for increased State aid in order to meet these objectives.

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. Let me be clear that I am not one of those people. The structural problems of the European economy will not be solved by throwing money at them. Experience has shown us time and time again - and does so today - 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, identified cases of market failure, provided that evidence is available that State aid is an appropriate solution, and will not unduly harm the conditions of competition in the Community.

These calls for more flexibility have been heightened by concerns, even among Member States which have traditionally supported a strict State aid control, that a ‘one-size fits all’ State aid policy may no longer be feasible after enlargement.

A series of Council conclusions, most recently under the Danish Presidency, 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.

Of course, at a political level, many public subsidies have a superficial attraction in terms of their support to certain sectors but they are often not really effective in competitiveness terms. Hence, the need for Member States not just to look at illegal, distorting aid but to eliminate ineffective aid.

All of these factors require a greater effort on our part to better articulate the economic underpinning of State aid law, and its role in the realisation of the broader objectives of the Community. We must also take account of the manner in which these objectives and tasks of the Community have undergone a fundamental change in recent years as a result of successive Treaty amendments - from the more limited task of breaking down

the barriers to an internal market towards the much more dynamic task of creating the conditions for a competitive and dynamic European economy within an economic and monetary union.

The future development of State aid law

I come now to look at the current state of State aid law, and how it might evolve to meet these challenges, without undermining the principle of a strict control of State aid to prevent distortions of competition and trade within the Community.

In many respects, our State aid rules 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. We have a series of different frameworks and guidelines which set out the basis on which the Commission will assess the effects of certain types of aid on competition. And we also benefit from a very substantial body of case law which gives concrete guidance on many issues.

Yet, in other respects the foundations of our State aid control are rather weak. There is sometimes a lack of clarity, even at the basic conceptual level, of what is or is not a State aid, and it is notable that this theme dominates the whole of today's discussions.

I do not want to enter into the details of what is clearly a complex legal debate, and we will of course respect the decision of the Courts, whatever that may be. However, it is clear that uncertainty over such basic questions risks to undermine the legitimacy of State aid control. And I would wish to draw attention to the dangers which arise if legal concepts diverge too far from the underlying economic concepts.

Another weak point in our current system lies in the difficulty of ensuring the effective recovery of aid in many cases. 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. Indeed a number of the Member States have adopted insolvency laws, modelled to a greater or lesser extent on the U.S 'Chapter 11' which are designed to protect the company, and its economic activity from its creditors, including the State. 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 also be charged with monitoring and enforcing compliance with State aid decisions.

This brings me to perhaps the most sensitive part of my remarks today. In my discussions with Ministers from the different Member States, I am constantly confronted by the concern that the concept of State aid has now become too widely drawn, and that the Commission is being drawn into too many matters of purely local concern which do not have a real Community dimension. I do not need to remind this audience that Article 87(1) of the Treaty does not require that the effect of an aid on trade or competition has to be significant, or appreciable. As the case law constantly tells us, it is usually possible to infer the existence of an effect on competition from the fact that an aid has given a selective advantage to one company over its competitors.

Likewise, any effect on trade, however small, is in principle sufficient to bring an aid within the scope of the Treaty.

Let me make it clear that I do not contest this case law, which is clearly well-founded, and has in fact served the Commission well in developing the principles of State aid control. However, when I look at some of the cases which now come before us, where the Community interest is rather marginal, I do sometimes wonder whether the Member States may have a point.

From the lawyers' point of view, the answer to these concerns appears simple. The Treaty consistently applies a much stricter standard of control to the actions of Member States than of undertakings to avoid any risk of Member States interfering with the operation of the internal market. Moreover the presumption of incompatibility of aid in Article 87(1) is only a presumption, which can be rebutted if the aid is shown to be compatible with the common interest.

However, such an answer may not be sufficient. I think we must be prepared to show that State aid control is necessary, proportionate and relevant.

How has the Commission tried to meet these challenges?

I would now like to take a look at how we have sought to meet these challenges in our work in recent years.

As regards the objective of reorienting aid towards horizontal objectives, the Commission has laid down a series of frameworks which cover the main types of horizontal aid, such as SMEs, research and development, environmental aid, training aid and employment 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 three key points.

First, we are committed to eliminating unnecessary procedural formalities whenever possible. In the case of aid for SMEs, training and more recently aid for employment, the old frameworks have now been replaced by block exemption regulations, which eliminate the need for notification by Member States of individual aid or aid schemes. The Commission has just launched a public consultation exercise on a new block exemption regulation which will exempt research and development aid for SMEs from prior notification to the Commission.

Second, our aim is to ensure that our State aid policy takes full account of other Community objectives, in particular in areas like environment policy. Thus for example the guidelines on State aid on environmental protection, adopted in 2001, provide a very generous framework for aid for the development of renewable energy supplies.

Third, 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.

Our current programme

With enlargement now less than a year away, and with the mandate of the current Commission expiring in the Autumn of 2004, we have an extensive ongoing work-programme. This is focussing on three main areas of activity: changes in procedures and working methods; devising simpler methods for dealing with less important aids and revising the substantive State aid instruments.

As regards procedures and working methods, I have recently made a number of organisational changes to DG Competition. Although these focus more on the merger and anti-trust side of our activities, some of the changes made will also have implication for the State aid. In particular the appointment of a Chief economist and the introduction of review panels should lead to a better motivation of the major economic issues involved in our key decisions. The creation of a new unit dedicated to monitoring and to the enforcement of decisions requiring the reimbursement of illegal aid will help strengthen the effectiveness of the policy.

We have also launched a dialogue with Member States (as well as the candidate countries) with a view to simplifying procedures to the maximum. This dialogue has already led to some detailed changes in our working methods. Thus for example we have recently adopted and published a new State aid complaint form which should be used for all future complaints about State aid. We have also published a communication clarifying that compound interest should usually be used for the recovery of unlawful aid. In addition, we are currently considering whether to bring forward for consultation a draft implementing regulation setting out details of notification procedures, annual reports, timelimits and recovery.

One of the issues raised by Member States in this dialogue is the need to avoid heavy notification and assessment procedures for State aids which have only a minor economic importance and which do not raise significant competition concerns at the European level. Although we already have a de minimis rule, I would like us to try to go further. We have therefore started an intensive internal reflection on how it would be possible to distinguish between cases of less and such of high importance. I hope that we will be able to see more clearly about whether such "test" is actually possible within the coming months.

As regards the State aid instruments themselves, our work over the remainder of my mandate will be dominated by four key issues, the review of the regional aid guidelines, the review of the guidelines on aid for rescue and restructuring companies in difficulty, shipbuilding and services of general economic interest.

As regards the regional aid guidelines, it is clear that the situation will change significantly after enlargement. The greater part of the territory of the candidate countries will receive assisted region status. There will thus be a clear need to look again at our approach to regional aid, while at the same time taking full account of the parallel review of the structural fund regulations.

For rescue and restructuring aid, the situation is rather different. This type of aid has to be considered as potentially highly distortive, and the review of the current guidelines, which expire in 2004, will focus on whether we may not need to attach stricter conditions to aid given to undertakings in financial difficulty, while at the same time ensuring that the necessary means are available for the training and reemployment of the workers concerned.

As regards services of general economic interest, it is clear that we must respond to the requests for greater clarity from the European Council. Although work in this area has been delayed by uncertainty over whether compensation for the cost of providing services of general economic interest constitutes aid, we have made some progress on the more technical issues including the calculation of compensation. A technical working document has been discussed with Member States and placed on the web. As a parallel but quite separate exercise, the Commission has now launched its Green Paper on Services of General interest. This Green Paper intends to launch a large debate on key questions, like the scope of possible Community action in full respect of the subsidiarity, the definition of good governance in the area of organisation, regulation and financing of services of general interest, or the added value of a framework directive. All interested parties can comment on these questions by mid-September.

Concluding, I think that all this shows that the European State Aid Law Institute and its Quarterly were established at the right time and will certainly not run out of work in the foreseeable future.

Thank you for your attention.