

EN

EN

EN

## **COMMON PRINCIPLES FOR AN ECONOMIC ASSESSMENT OF THE COMPATIBILITY OF STATE AID UNDER ARTICLE 87.3**

### **1. INTRODUCTION**

1. State aid control is an essential component of competition policy and a necessary safeguard to preserve effective competition and free trade in the single market.
2. The Treaty provisions on State aid take into account that when granting State aid, Member States aim to foster the economic or social development in their territories. They may do so by attracting foreign direct investment. Firms' decisions to settle, invest, expand or just maintain production in a given location normally generate sizable benefits for the host country. They may create or maintain employment, higher tax revenues or economic growth. State aid granted by national governments can also affect trade flows in goods and services in the European Union (EU) as the recipient of the aid may gain a competitive advantage over its foreign rival. As a result, it may lower its prices, expand output or increase investment (including R&D activities).
3. However, the EC Treaty also takes into account that, when considering State aid measures, national governments often do not regard possible negative spill-over effects on other countries. Member States may have incentives to use State aid strategically to promote national economic interests and develop activities on their territory, which may undermine the internal market and be against the common European interest. If State aid diverts similar activities elsewhere, it may be to the detriment of other Member States, and in particular to the detriment of less prosperous ones. State aid to domestic firms also shifts rents away from foreign rivals who lose profits and market shares and may decide as a result to cut employment and reduce investment (including R&D expenditures). Finally, aid with such cross-border effects may trigger reactions by other Member States. Such subsidy race could lead to an excessive amount of aid, at the expense of taxpayers and could seriously damage the internal market.
4. Article 87.1 of the EC Treaty thus establishes the principle that State aid, which distorts or threatens to distort competition, is prohibited in so far as it affects trade between Member States.<sup>1</sup> However, State aid, which contributes to well-defined objectives of common European interest without unduly distorting competition between undertakings and trade between Member States, may be considered compatible with the common market. Article 87.3 of the EC Treaty therefore allows exceptions to the general prohibition of State aid in order to achieve such objectives in the common interest<sup>2</sup>. As a result, for measures which have been found to fall

---

<sup>1</sup> In addition, subsidies granted by EU Member States may also be subject to international agreements, such as the WTO subsidies agreement.

<sup>2</sup> In addition, see also Art. 87.2 for, amongst others, aid having a social character or aid to make good the damage caused by natural disasters.

under Article 87.1, the European Commission has to assess their compatibility under Article 87.3. Within this mandate, the Commission assesses a wide range of aid targeted by Member States at objectives of common interest of economic and social development. This assessment should be based on the application of sound economic principles. In the State Aid Action Plan,<sup>3</sup> the Commission therefore announced that it would strengthen its economic approach to this compatibility analysis. The core element of the refined economic approach is the balancing test.

5. The present paper aims at providing more details and clarifications on the methodology used for the Commission's assessment under the balancing test.<sup>4</sup> This balancing methodology is already established in the Commission's past practice and was presented with a lesser degree of detail in the State Aid Action Plan. The general analytical principles of the balancing test are also reflected, with adaptations in the light of the specific policy context, in a number of guidelines for specific aid categories (e.g. aid in the field of R&D&I<sup>5</sup>, Risk Capital,<sup>6</sup> Environmental aid<sup>7</sup>) and have been applied in a number of Commission decisions, both within and outside the scope of application of such guidelines.
6. If a given aid measure, by nature of its objective, falls within the scope of existing guidelines and therefore has to be notified under these guidelines, only the assessment criteria (e.g. aid intensities, eligibility criteria) as formulated in those guidelines apply.
7. For that reason, the present paper does not replace any existing guidelines, although it draws on examples in fields covered by such guidelines to illustrate certain points. Cases which are covered by a particular guideline but fail to meet all conditions therein (e.g. because they surpass the permitted aid intensities or do not comply with all eligibility criteria) will be declared incompatible and the Commission will not re-assess them by using the present paper.<sup>8</sup> The methodology in the present document is also potentially relevant with respect to aid measures which manifestly fall outside the scope of any guideline or block exemption. However, the present paper does not prejudice the Commission's assessment of the weight to be attributed to certain parameters in a given case, and in particular the relative weight to be attributed to the claimed efficiency or equity benefits of a given aid for the common interest and the distortive effects of the aid on competition between undertakings and on trade between Member States. Furthermore, the degree of detail of the Commission's assessment will be adapted to the specific circumstances of the case at hand.
8. Where a Member State notifies an aid to an individual project and beneficiary, the Commission focuses its analysis on the expected impact of the specific aid. Where a

---

<sup>3</sup> See para. 22 of the State Aid Action Plan, COM (2005) 107 final of 7.6.2005.

<sup>4</sup> The present [document] thus does not cover the question whether a measure constitutes State aid or not under Article 87.1 of the EC Treaty. See for the interpretation of the concepts as laid down in Article 87.1 the jurisprudence of the Court, e.g. in case C-83/98 French Republic v. Ladbroke Racing Ltd and Commission of the European Communities [2000] ECR I-3271 or case T-67/94 Ladbroke Racing Ltd v. Commission of the European Communities [1998] ECR II-1

<sup>5</sup> OJ C 45, 17.02.1996, p. 5.

<sup>6</sup> OJ C 194, 18.8.2006, p. 2.

<sup>7</sup> OJ C82, 1.4.2008, p. 1.

<sup>8</sup> This is in particular the case for regional investment aid outside of areas listed in approved regional aid maps.

Member State intends to introduce an aid scheme which potentially benefits a number of undertakings, analysis is concentrated on the typical cases which are expected to be covered by the scheme as well as on cases which represent a worst-case scenario insofar as they could give rise to substantial distortion, e.g. by involving high aid amounts and/or high aid intensities.

## **2. METHODOLOGY FOR COMPATIBILITY ANALYSIS: THE BALANCING TEST**

9. The assessment of the compatibility of an aid is fundamentally about balancing its negative effects on trade and competition in the common market with its positive effects in terms of a contribution to the achievement of well-defined objectives of common interest.<sup>9</sup> Balancing these effects takes into account the impact of the aid on the social welfare of the EU. For that purpose, the Commission has established a test which consists of the following questions:

1. Is the aid measure aimed at a well-defined objective of common interest?
2. Is the aid well designed to deliver the objective of common interest i.e. does the proposed aid address the market failure or other objectives?
  - i. Is the aid an appropriate policy instrument to address the policy objective concerned?
  - ii. Is there an incentive effect, i.e. does the aid change the behaviour of the aid recipient?
  - iii. Is the aid measure proportionate to the problem tackled, i.e. could the same change in behaviour not be obtained with less aid?
3. Are the distortions of competition and effect on trade limited, so that the overall balance is positive?

10. Economic tools may be useful to answer these questions and verify that State aid is necessary and proportionate. The first two questions address the positive effects of a State aid measure, whereas the third question refers to its negative effects on competition and trade and compares the positive and negative effects of the aid.
11. A balancing exercise naturally requires a common framework to evaluate and compare the different elements being weighted. Such framework is provided by the analysis of the impact that State aid has on the welfare of all stakeholders and in particular on the welfare of the recipient, its competitors, consumers but also input suppliers (for instance labour). The main effects that State aid can be expected to have on the welfare of stakeholders is summarized in Box 1.
12. As regards the first question, the EC Treaty only provides for some exceptions to the general prohibition of State aid. It is thus necessary to first assess whether the objective pursued by the aid is indeed one that can be regarded as being in the common interest, and to assess the acceptability of that objective. Applying concepts

---

<sup>9</sup> In the meantime, the balancing test has been applied to a number of cases. See list of exemplary cases in annex I.

developed in the economic theory, whether a measure contributes to an objective of common interest can be understood either in terms of its contribution to overall welfare and efficiency (does the State aid allow to remedy to a market failure) or in terms of equity (i.e. how is welfare distributed). All objectives of common interest can thus be described as contributing to efficiency and/or equity. As discussed below, contributions to efficiency are analysed in the framework of market failures.

13. The second step is then to assess whether the aid is properly designed to reach the well-defined objective of common interest. More specifically, even if it addresses a well-defined objective, a particular State aid may not be an appropriate instrument. This would be the case where the State aid fails to deliver the desired objective or where other less distortive instruments achieve the same results. Further, the aid must actually induce the recipient to change its behaviour in such a way that the objective can be achieved. This condition would not be fulfilled in cases where the aid is not necessary because the beneficiary would achieve the objective even in the absence of aid. Finally, the aid amount should not exceed the amount necessary to achieve the objective.
14. The last question addresses the negative effects of State aid. Even if it is well-designed to address an objective of common interest, an aid given to a particular undertaking or economic sector may lead to an unacceptable degree of distortion of competition and of trade between Member States.
15. The overall balancing requires not only to trace the effects of the aid on producers and on consumers in the Member States, but also to evaluate their magnitudes and to compare them subsequently. This implies for instance that negative effects of a considerable magnitude need to be offset by a corresponding high level of positive effects.
16. Respectively, if the distortion of competition is found to be limited, positive effects can be smaller accordingly. In such cases the Commission will normally carry out a less detailed balancing exercise. Besides, State aid falling within the scope of Article 87.1 of the EC Treaty and which is without any positive effect, is prohibited on the basis of that provision, without there being any need to examine the magnitude of the negative effects.
17. In order to assess the impact of the aid, the Commission must identify a counterfactual scenario with which the situation in which the aid is given can be compared. The question to be asked in this context is what the situation will be if no aid is given.

#### **Box 1. Tracing the effect of aids**

Aid changes the incentives and constraints under which the recipient operates so that its behaviour is affected. As a consequence, this will affect competitors, consumers and other stakeholders. It is useful to describe the effects of aid on the behaviour of the beneficiary in order to also determine its consequences on other stakeholders. The magnitude of the costs offset by the aid and the degree to which they are "sunk" are key elements.

Aid which covers fixed (and sunk<sup>10</sup>) cost (like investment into new plants and equipment) will typically affect firms' decisions on business developments.

Some examples of the resulting effects include, e.g.:<sup>11</sup>

**Market entry:** the aid may be used to cover entry costs and result in investment in additional or alternative production (or be used to prevent exit that would otherwise take place). Competitors of the beneficiary undertaking may lose market shares and therefore reduce profits. They may react by reducing their own investment plans. If such an entry leads to an increase in overall output and competition, consumers may benefit in the short-term. But aid to subsidise market entry would normally produce negative effects on the operators already active in the market, as they have to face a new competitor. Anticipating a risk of subsequent subsidised entry may negatively affect private incentives to invest. Such negative effects would be higher if, as a result, more efficient competitors are forced to exit the market.

Moreover, the aid may result in **displacing** activities or investments from one region into another (so that there is no additional capacity). This may take place through relocation of factories that would have gone elsewhere in the absence of aid or activities or simply through the growth of economic activity in the aided region to the detriment of other locations. While regional development may be improved in the region of the recipient, the aid may equally have a negative impact in the region where the investment has been withdrawn.

**Market exit:** the aid may be used to cover exit costs and result in disposing of assets and activities (e.g. restructuring). In this case, competitors will benefit and possibly expand their own capacity. Aid may enhance efficiency if the assets of the exiting firm are managed better by their new owners and output is produced by more efficient firms. Reciprocally, aid may prevent market exit.

**Research and development:** the aid may allow some investments and projects to go ahead which would otherwise be unprofitable or too risky for private investors to undertake on their own. If those projects or investment generate positive spill-overs, they may benefit consumers, the beneficiary and competitors.<sup>12</sup> However, if such aid crowds out private investment by beneficiary's competitors, the total amount of investment may be reduced.

Aids to alleviate variable costs typically influence firms' marginal output and pricing decisions (at any given level of fixed cost). This aid may affect competition in different ways, e.g.:<sup>13</sup>

**Increase in output and a reduction of price:** the aid may allow the beneficiary to lower the price and increase sales.<sup>14</sup> The competitors of the beneficiary undertaking may lose market

---

<sup>10</sup> Sunk (irrecoverable) costs affect business decisions ex ante, but once they are incurred they do not matter for the decisions of rational market players. Aid covering sunk costs is therefore potentially less distortive. In contrast, variable costs shape incentives in business decision making and aid designed to cover such costs is potentially of the most distortive type. It is, however, not always possible to disentangle variable from fixed/sunk costs. In particular, investments in new more efficient facilities may permanently alter the variable cost of additional production.

<sup>11</sup> Non-exhaustive list.

<sup>12</sup> However, if the competitors can have access to the result of the subsidised research and development activities only paying a significant fee to the beneficiary undertaking, they may be put at a competitive disadvantage vis-à-vis the latter and therefore reduce their market shares and profits.

<sup>13</sup> Non-exhaustive list. In particular, operating aid may also facilitate market entry and exit, change of location and research and development.

shares and obtain lower profits and may reduce their own production and adjust their own investment plans. The effect would normally benefit consumers of the subsidised goods (lower prices, at least in the short run) and the beneficiary (higher profits) at the expense of the competitors. The increased allocation of resources to the subsidised goods will likely have negative consequences for those markets wherefrom the resources would otherwise be used.

Increase and/or change in the **acquisition of inputs**: the aid may result in lower costs for certain inputs (e.g. training, more environmentally friendly materials). Aid could change the production process: different materials, workforce or inputs being used (e.g. employing more handicapped workers, producing less pollution). This effect is likely to benefit the beneficiary and the input market participants but may harm the suppliers of competing inputs. Competitors may be harmed to the extent that aids change the output of the recipient or its ability to attract investments. The new production process might be beneficial for overall welfare if it creates positive spill-overs (e.g. less pollution, better knowledge) which outweigh the negative impact on the competitors of the beneficiary undertaking.

### 3. IS THE AID AIMED AT AN OBJECTIVE OF COMMON INTEREST ?

18. State aid may be authorised by the Commission if it contributes to the achievement of one or more of the objectives of common interest identified in article 87.3 of the EC Treaty. Whether a measure contributes to an objective of common interest can be understood either in terms of its contribution to efficiency or in terms of equity. Member States wishing to grant State aid should therefore define the objective they pursue, and in particular explain whether the objective rather aims at increasing market efficiency or at addressing equity problems. Certain objectives may cover both equity and efficiency problems.<sup>15</sup>

#### 3.1. Efficiency objectives

19. In the absence of evidence to the contrary in a specific case, the Commission considers that markets deliver an efficient allocation of resources in the economy. However, there may be circumstances in which Member States can demonstrate that markets fail to deliver an efficient outcome<sup>16</sup> for instance in terms of socially profitable investment not being undertaken, in terms of some activities being excessively provided<sup>17</sup> or not provided at lowest costs. In such cases, the granting of State aid may produce positive effects and overall efficiency can then be improved by adjusting firms' incentives through State aids. Generally, any market failure needs

---

<sup>14</sup> Aid to increase capacity will also have such effect, even though the increase of capacity is achieved by a fixed expenditure. As a result of increased capacity, the beneficiary can expand output over the former capacity level at normal marginal cost.

<sup>15</sup> For instance, aid to promote culture may target equity when it broadens the access to cultural goods and services to people that otherwise would not be able to consume these, but may also target efficiency when it addresses the market failure linked with the positive externalities of culture. See e.g. COM(2001) 534 final; Communication on certain legal aspects relating to cinematographic and other audiovisual works, and notably point 2.3.

<sup>16</sup> In economic terms, an efficient outcome corresponds to a situation where the allocation of resources is optimal in the sense that no one can be made better off without making someone else worse off. State aid has an impact on the incentives of market participants and can change their behaviour thereby altering the market outcome.

<sup>17</sup> Examples include polluting activities, the harm of which may not be fully taken into account by the undertakings causing it.

to be significant for State aid to improve efficiency. Analysing the presence and magnitude of **market failures** is therefore necessary to identify the effect of State aids on efficiency.

20. The fact that a specific company may not be capable of undertaking a project without aid does not necessarily mean that there is a market failure. For instance, the decision of a company not to invest in a project with low profitability or in a region with limited market demand and/or poor cost competitiveness may not be an indication of a market failure, but rather the sign of a well functioning market. There can be no presumption that aid with the objective of increasing production or lowering price can be justified on the ground of a market failure, as excess capacity<sup>18</sup> or overconsumption<sup>19</sup> may be inefficient or even detrimental to the economy and society as a whole. Only where market forces alone, in the absence of aid, would not be able to reach an efficient outcome, can a market failure be considered to exist. In this case, well-designed government intervention has the potential to improve the allocation of production factors, correct the market failure and allow reaching the common interest goal.
21. Market failures can come in different forms and possess different origins and characteristics. Two of the most common sources of market failures are:

### ***Externalities***

Externalities arise where market players do not internalize the whole benefit or cost of their actions, because of incomplete property rights. An example of an activity with a positive externality is research and development (R&D). When firms are able to effectively patent the results of their research, positive externalities are less likely to be acknowledged. By contrast, if firms are unable to appropriate the full benefit of their R&D expenditure they may invest in R&D at a level, which is less than optimal for total welfare. A negative externality arises in case of pollution through industrial activity. If firms do not pay the full cost of polluting (e.g. health care for people whose health was harmed by the increased pollution), they may pollute more than it is optimal for total welfare.

### ***Imperfect and asymmetric information / coordination problems***

***Imperfect and asymmetric information*** may lead to transaction costs, agency costs, moral hazard or adverse selection, which as a consequence lead to inefficient market outcomes. An example for this can be found in the financial market, where start-up firms often face problems in finding adequate funding (due notably to lack of collateral, of stable cash flows, of market reputation) despite having a potentially very valuable business plan. As a result, insufficient funding may be provided to ventures that would increase economic activity in an efficient manner. This does not mean however that all ventures should receive funding in general because of presumed imperfect information. To the contrary, it is a sign of market efficiency that projects with lower returns on investments are not financed and Member States

---

<sup>18</sup> Historical examples can be found in some industries like steel, textile or shipyard.

<sup>19</sup> Examples of excessive consumption due to subsidised prices may include depletion of scarce resources like water or fossile fuels or possibly excessive purchase of credit from subsidised banks.



must demonstrate precisely how its interventions address the problem of imperfect information.

*Coordination problems* may also lead to market failures, where the costs of contracting, uncertainty about the collaborative outcome and network effects prevent the effective design or even the conclusion of contract agreements, thus leading to inefficiently low levels of coordination and output. Imperfect information may prevent firms from taking mutually beneficial decisions. This may arise with respect to the setting of standards, in cooperation agreements and in the context of cluster formation<sup>20</sup>. For instance, a research project may yield results that lead to different development strategies that are hard to predict ex ante. As a result, contracts between parties involved in investments projects will be incomplete and some parties may not undertake the efficient levels of joint investment (in particular those parties that exercise little control in case of unforeseen events) or fail to invest at all. This arises for instance when partners in a research project contribute very different skills and knowledge that may or may not turn out to be valuable.<sup>21</sup> Parties will also incur significant costs designing and enforcing appropriate contracts. These coordination problems and the cost of coordinating will presumably increase with the number of contractual partners. Coordination problems may also stem from the need for a given technology, standard or practice to have reached a certain critical mass before it makes sense to adopt it or to build complements for it, or from the need to incur sunk costs before a contract can be signed between parties.

22. Besides, public goods may be of relevance for the analysis of State aid. Public goods can be consumed without being exhausted and it is difficult to exclude anyone from using them (and hence making them pay for the goods). Despite being beneficial for society public good may not be provided by the market.<sup>22</sup>
23. The fact that a project has positive effects which are not fully appropriated by the aid beneficiary, or that it may suffer from coordination or imperfect information problems does not automatically lead to the conclusion that there is a market failure. It is only where the Member State demonstrates that these elements affect the profitability of the project to such extent that it would not be undertaken (or only insufficiently undertaken) from an efficiency perspective<sup>23</sup>, that there can be question of market failure.
24. There are many ways to identify market failures. They may in some cases be quantifiable. For instance, Member States may sometimes be able to provide econometric estimates of knowledge or environmental spill-overs. However, there is

---

<sup>20</sup> In the presence of agglomeration externalities a firm's profitability increases when it is located close to its competitors, suppliers and customers. In this context, a government might be able to trigger or reinforce the development of a cluster.

<sup>21</sup> See for instance case N 854 / 2006 - Soutien de l'agence de l'innovation industrielle en faveur du programme mobilisateur pour l'innovation industrielle TVMSL, OJ C 182, 04.08.2007.

<sup>22</sup> Another reason why the market may not lead to an efficient outcome is the existence of market power, for instance in a situation of a monopoly. However, in most markets where some players enjoy a certain degree of market power, and where markets may not be considered fully efficient, the Commission will normally not retain this as a sufficient justification for granting State aid, i.e. to smaller or maverick players.

<sup>23</sup> This would be the case when the cost of the activity is high enough to wipe out the profit of the undertaking, but still lower than the overall benefit for society.

rarely enough information available to conduct fully-fledged econometric studies in the context of particular cases. Market inefficiencies can also be identified through benchmarking or surveys which show that a given market is characterised by significant external effects or information problems (within the meaning explained above).

25. In addition, some criteria may be relevant to identify more specific market failures, and to relate these market failures to some specific objectives of common interest:

Type of market failure	Areas likely to be affected	Specific assessment criteria
<i>Externalities:</i>	R&D&I aid (positive externalities), Training aid (positive externalities), Environment aid (avoidance of negative externalities)	<ul style="list-style-type: none"> <li>• Existence of similar projects without aid (if similar projects exist there is unlikely to be a market failure)</li> <li>• Possibility to appropriate the benefits of the activity notably through contracts, Intellectual Property Rights, secrecy</li> <li>• Level of dissemination foreseen</li> <li>• Specificity of the externality produced</li> <li>• Transparency about the nature and magnitude of the external effects produced towards consumers and trading partners</li> </ul>
<i>Imperfect information</i>	Risk Capital, R&D&I aid, Employment aid	<ul style="list-style-type: none"> <li>• Type of beneficiary, probability of default</li> <li>• Scope for ex ante evaluation and ex post monitoring of the targeted activity, notably as regards its profitability and/or quality</li> <li>• Availability of information and expertise in the targeted sector and/or about the targeted activity and recipient</li> </ul>
<i>Coordination problems</i>	R&D&I aid, Employment aid	<ul style="list-style-type: none"> <li>• Number of undertakings needing to collaborate</li> <li>• Intensity of previous collaboration</li> <li>• Diverging interests between collaboration partners</li> <li>• Problems in designing contracts, importance of unknown contingencies</li> <li>• Problems to coordinate collaboration (linguistic issues, time, distance, travel costs, lack of easy communication channels, sensitive information)</li> </ul>

### 3.2. Equity objectives

26. Markets select winners and losers and in that process the market can produce or reinforce inequalities. Governments may consider these inequalities unacceptable and choose to intervene and transfer wealth between individuals in order to reduce social or regional inequalities. Some State aid may therefore target equity objectives.
27. A number of objectives of common interest (such as aid for R&D&I, environment, training or risk capital) aim at correcting market failures and thus target efficiency

problems. In these cases equity considerations will normally play a minor role in the balancing of positive and negative effects of the aid. However, even in these cases, equity considerations may also be at stake (e.g. if aid is aimed at relocating an R&D&I project from one region to another).

28. On the other hand some aid measures might be clearly targeted at equity objectives. For instance,

- Regional aid has the objective of furthering economic cohesion by helping to reduce the gap between the development levels of the various regions of the EU. Regional investment aid is designed to assist the development of the most disadvantaged regions by supporting investment and job creation and by promoting the expansion and diversification of the economic activities of enterprises located in the less-favoured regions.
- Aid for the provision of services of general economic interest may be pursued for equity reason, especially when a Member State considers that an efficient market would not adequately offer these services to all citizens.
- Certain categories of workers experience particular difficulty in finding jobs, because employers consider them to be less productive. State aid may help disadvantaged workers to enter the labour market or disabled workers to integrate or stay in the labour market by covering the extra-costs induced by their perceived or real lower productivity.
- Aid for rescue and restructuring may be pursued to avoid losses of employment and activity in a location or sector.<sup>24</sup>
- Aid for cultural products or services may also be pursued for equity reasons (for example when preserving cultural diversity) in addition to the correction of market failures linked with positive spill-overs.

In some other circumstances, State aid measures which target equity objectives can be designed and implemented through market mechanisms (as the area of rescue and restructuring). Ultimately reaching a competitive market outcome may be a requirement for such aid to be approved.<sup>25</sup>

29. Although specific equity objectives may vary from Member State to Member State, it will often be possible to identify a broad common interest in the pursuit of such objectives. Equity justifications may be demonstrated by statistical indicators illustrating social or regional disparities. These may include GDP per capita, unemployment levels, participation rates in the labour market, poverty indicators, etc.

---

<sup>24</sup> The Commission will revisit the existing Rescue and Restructuring Guidelines in due time to take account of the experience gained in the context of the current financial crisis.

<sup>25</sup> For example, open access requirements are a prerequisite for the approval of State aid measures in network deployment.

#### **4. IS THE AID WELL DESIGNED TO DELIVER THE OBJECTIVE OF COMMON INTEREST ?**

##### **4.1. Appropriate instrument**

30. Member States can make different choices with regard to policy instruments and State aid control does not super-impose a single way to intervene in the economy. However, where they use State aid falling under Article 87.1 of the Treaty, it can only be justified by the appropriateness of this particular instrument of State intervention to meet the public policy objective and contribute to one or more of the common interest objectives of the Union.<sup>26</sup> In cases in which State aid is not an appropriate instrument to tackle a particular efficiency or equity concern, it might create distortions of competition and trade that could be avoided or limited by using another policy tool (e.g. regulatory instruments, direct provision of goods and services by the State or taxation instruments in order to redistribute wealth and to set incentives for undertakings).
31. The Member State's choice of a particular policy instrument can be undertaken on the basis of experience, through benchmarking or as a result of scenarios and cost-benefit-analysis. In its compatibility analysis, the Commission will take particular account of any impact assessment of the proposed measure that the Member State has made. The Commission will consider a measure to constitute an appropriate instrument, where the Member State has considered other policy options and where the advantages of using a selective instrument such as State aid are established and demonstrated to the Commission.

##### **4.2. Incentive effect**

32. State aid must change the behaviour of a beneficiary undertaking in such a way that it engages in activity that contributes to the achievement of a public-interest objective that (i) it would not carry out without the aid, or (ii) which it would carry out in a restricted or different manner. This implies that it has to be demonstrated by the Member State in individual cases that the aid is not used to subsidise the costs of an activity that a company would anyhow incur.<sup>27</sup> The change of behaviour is called the incentive effect and can be identified by comparing a situation with and without the aid.<sup>28</sup>
33. Whereas the aid may lead the beneficiary to change its behaviour in a number of ways, the intended change of behaviour must be likely to lead to the achievement of the targeted policy objective pursued.

---

<sup>26</sup> See for a discussion of appropriateness cases C 25 / 2004 - *DVB-T Berlin-Brandenburg* (OJ L 200, 22.07.2006) or N 854 / 2006 - *Soutien de l'agence de l'innovation industrielle en faveur du programme mobilisateur pour l'innovation industrielle TVMSL*, OJ C 182, 04.08.2007.

<sup>27</sup> E.g. training aid must not finance training activities, which the beneficiary would have carried out anyway due to operational imperatives. See for example. C 40 / 2005 – *Ford Genk* (OJ L 366, 21.12.2006).

<sup>28</sup> Comparing a situation with and without the aid is also called counterfactual analysis. See for example the counterfactual analysis carried out in cases N 349 / 2007 -*Soutien de l'agence de l'innovation industrielle au PMII OSIRIS* (OJ C 304, 15.12.2007); N 887 / 2006 -*Projet Bernin 2010* (OJ C 200, 28.08.2007); N 185 / 2007 -*Soutien de l'Agence de l'innovation industrielle en faveur du programme « NANOSMART »* (OJ C 284, 27.11.2007).

34. With regard to *efficiency objectives*, the Member State must demonstrate the incentive effect by showing that the beneficiary undertaking has changed (or is likely to change) its level of activity, and consequently correct the market failure and improve the market outcome. For instance, R&D aid will require an increase in the size, scope, speed or expenditure of R&D activities, and training aid should result in an overall increase in its training provision.
35. In order to permit the Commission to measure the claimed incentive effect, it will typically be important for the Member State to produce internal documents of the aid beneficiary which demonstrate that it would not undertake the targeted activity without aid.<sup>29</sup> These internal documents can, among others, be of the following kind:
- Budgetary forecasts for the costs targeted by the aid
  - Business plans and other documents submitted to investment committees in order to obtain approval to commit resources to certain activities
  - Profitability calculations for a given project with and without aid
  - Project finance analysis, including scenario forecasts or cash flow paths
  - Risk assessments with regard to the risk of commercial failure, to the irreversibility of the investment and associated costs or to the uncertain profitability of the targeted activity.
36. In addition to analysing internal documents, the Commission may also take account of available external information, e.g. industrial benchmarks for profitability or risk.
37. With regard to *equity objectives*, demonstrating the incentive effect requires the Member State to show that carrying out the targeted activity entails additional costs<sup>30</sup> coming from social or regional handicaps, which are compensated for by the aid. For instance, a precondition for employment aid is that disadvantaged or disabled workers are employed instead of able-bodied workers, because employing them entails additional costs.
38. However, there may be valid reasons that would lead the aid recipient to adopt the behaviour even in the absence of aid. The Commission will consider the indicators provided by Member States to demonstrate a social or regional<sup>31</sup> disadvantage and evaluate whether or not there are sufficient incentives, in the absence of aid, to perform the targeted activity. The following indicators may be relevant:
- Regional handicaps (e.g. accessibility, infrastructure, lack of trained workers, income indicators, unemployment indicators)

---

<sup>29</sup> It should be noted that, in order for a market failure to be established, it must also be demonstrated that other undertakings, i.e. market forces in general, could not adequately achieve the objective without aid. This includes real costs as well as opportunity costs.

<sup>30</sup> This includes real costs as well as opportunity costs.

<sup>31</sup> As to the assessment criteria for Large Investment Projects in the context of Regional Aid see "Commission Notice on Guidance for an in-depth Assessment of Regional Aid to Large Investment Projects".

- Profile of the targeted population (e.g. age, gender, ethnic origin, disadvantaged or disabled workers)
- Incentives for changing the behaviour despite social handicaps: e.g. creation or change of the company image, scarcity of available alternative personnel, qualification and productivity of the targeted personnel.

### **4.3. Proportionality**

39. Aid is considered to be proportionate only if the same result could not be reached with less aid and less distortion. The amount and intensity of the aid must be limited to the minimum needed for the aided activity to take place. As soon as the aid exceeds the minimum necessary, the aid recipient will benefit from a windfall profit that might unnecessarily distort competition and cannot therefore be found compatible with the common market.
40. To evaluate the proportionality of the aid, information used for the analysis of the incentive effect may be applied. However, whereas the incentive effect is essentially a question of whether or not behaviour is changed, the analysis of the proportionality of the aid requires a different degree of appreciation as it regards the extent to which the aid exceeds what is necessary to produce the change of behaviour.
41. In a number of guidelines maximum aid intensities (expressed as a percentage of eligible costs) have been defined and the aid is normally deemed to be proportionate if these maximum aid intensities are respected. There may be cases, however, for which no such maximum aid intensities are defined. Furthermore, for those cases that fall under the detailed assessment of existing guidelines, it has to be verified whether this aid intensity is too high and the same result could not be obtained with less aid.
42. For such cases, the Member State should provide evidence which makes it possible to evaluate how much aid is needed to compensate for the additional activity intended by the aid, i.e. the extra costs the aid beneficiary will incur if it pursues the aided project compared to what would have happened without the aid. In addition, if the aided project comes with extra operating benefits for the aid recipient (i.e. lower costs due to the use of a new production technology or additional revenues) that are measurable, the Commission will take these operating benefits into consideration to determine the proportionate aid amount. The purchase of a more environmentally friendly machine, for example, may also lead to benefits in terms of energy-saving. By taking these extra benefits into account, net extra costs can be calculated.
43. The principle of evaluating net extra costs of an aided project can be applied to aid with an efficiency objective as well as to aid with an equity objective. However, the assessment of those two different categories of aid might differ inasmuch as in projects which are carried out for efficiency reasons the counterfactual scenario might be less straight-forward<sup>32</sup> (i.e. no project at all, a project of a different size, a less risky project etc.) than for projects with an equity objective (where the purpose of the aid is in general to change the way the aid recipient conducts its activities, e.g. by changing its location or the type of personnel employed).

---

<sup>32</sup> See for example discussion in case N 674 / 2006 - Soutien de l'Agence de l'innovation industrielle en faveur du projet NeoVal, OJ C 120, 31.05.2007.

## 5. DISTORTIONS OF COMPETITION

44. One can distinguish at least three kinds of distortions of competition induced by State aid. First, State aid, by interfering with the allocation of rents through markets, may have long-term dynamic effects on the incentive to invest and compete. Second, at a more specific level, State aids may affect competition in the product market and trigger different responses by competitors depending on the circumstances. Third, State aid may affect competition in the input markets and in particular the location of investment.
45. All these distortions of competition will affect the distribution of economic activities among sectors and among Member States and have detrimental impact on the internal market, by affecting trade and disturbing the efficient allocation of activities across national borders. In fact, the very possibility of State aid in one Member State being authorised may create incentives for other Member States to also make use of State aid measures in order to strategically attract activity to their territories, thereby prompting the risk of a subsidy race.
46. First, at a more general level, the fact that State aid reallocates rents in the markets and interferes with the competitive process may affect **long term incentive**. Firms anticipating that profits will be affected by State aid in addition to their own efforts may find it optimal to reduce their own efforts. State aid may thus have a negative impact on the incentives to invest and innovate for both the beneficiary and competitors. In the longer run, such a change in dynamic incentives leads to less choice, and potentially to lower quality or higher prices for consumers.
47. Second at a more specific level, one can expect that the change of behaviour of the aid recipient in the product markets will affect competitors and will trigger different adjustments in their behaviour. In particular, competitors might react by **reducing their own sales and investment plans** (crowding out). For instance, actual competitors might reduce capacity or potential ones decide not to enter in a new market. Competitors might also react by reducing their expenditures in research and development. See also Box 1 for more details. However, competitors will react to a different degree depending on market circumstances and aid characteristics. For instance, if competitors sell products that are close substitutes for those sold by the aid recipient, they will be more affected and one can thus expect that the magnitude of their adjustment will be greater. Distortions of competition may be enhanced if the beneficiary of the aid has market power. Where the aid recipient is already dominant on a product market, the aid measure may reinforce this dominance by further weakening the competitive constraint that competitors can exert.
48. Third, State aid can affect competition in the **input markets**. This arises if State aid favours the use of particular inputs (like particular labour or environmentally friendly intermediate products). Certain aid may result in lower costs for inputs (e.g. aid for training or environmentally friendly materials) and/or it could change the production process. The latter arises if, due to the aid, different materials, workforce or inputs are used (e.g. employing more handicapped workers, producing less pollution). While such aid may benefit consumers, the beneficiary and the input market

participants, it may harm the suppliers of competing inputs. As in the case of product markets, the overall effect on input markets may be negative if it discourages competitors' investment.

49. The main distortion in the input markets however arises with respect to the **choice of a particular location** (an input). Aid to attract investment may have a negative impact in the region where the investment has been withdrawn. It may lead to a waste of resources, if the latter region has a comparative advantage for this specific production.
50. Distortions of competition can arise within Member States but also across Member States. This arises when firms compete across borders but also when firms consider inputs, like locations in different Member States. Effects on trade generally occur when product markets are distorted and this may negatively impact on the distribution of activities among Member States and undermine the internal market. Aid aimed at relocating a production site to another region within the Common Market may not lead directly to a distortion in the product market, but it displaces activities or investments from one region into another. The Commission will focus on distortions arising across Member States.
51. In assessing the magnitude of the distortions of competition, the Commission will focus primarily on the effect that the change of behaviour of the recipient has on competitors and input suppliers. The effects on consumers will also be considered.<sup>33</sup>
52. In order to identify and assess the negative effects of the aid, the Commission identifies the competitors and the consumers that are likely to be affected by the change of behaviour of the aid beneficiary.
53. Therefore, to trace the effects of State aid, Member States should provide evidence permitting the Commission to i) identify the products concerned (i.e. products affected by the change of behaviour of the aid beneficiary) and ii) identify the competitors and consumers affected. (See box 2 for details.) This second step will normally lead to a delineation of product and geographic markets concerned by the aid.<sup>34</sup> However, this does not mean that the Commission will in all circumstances formally decide on the boundaries of the market.
54. The extent of the market analysis will have to be decided on a case by case basis. For the analysis of the positive effects of aid, a precise market delineation is normally not required. Nor is it always mandatory to delineate markets to assess the effects of an

---

<sup>33</sup> State aid constitutes a financial burden on taxpayers. This budgetary effect is equivalent to the aid amount. Beyond this budgetary effect, additional costs may occur due to inefficiencies and administrative costs linked to taxation. However, for the purpose of State aid control, it is not for the Commission to make an assessment of taxation systems in general or the proper use of taxpayers' money. The assessment of the size of the potential benefits of a measure - against which the distortion of competition and trade will be weighted - will take into account the financial burden on taxpayers in the implementing Member State.

<sup>34</sup> If needed, the Commission will borrow from the instruments that have been developed in the field of antitrust and merger control to delineate markets. See as example for decisions in which markets have been delineated inter alia: N 674 / 2006 - *Soutien de l'Agence de l'innovation industrielle en faveur du projet NeoVal* (OJ C 120, 31.05.2007); N 810 / 2006 - *AMD, Dresden – MSF 2002* (OJ C 246, 20.10.2007); N 409 / 2006 - *HighSi GmbH* (OJ C 77, 05.04.2007); N 582 / 2007 *Propapier PM 2 KG* (not yet published). Further exemplary examples can be found in the annex.



aid on location. Market analysis may however be important for the evaluation of the negative effects of State aid on competition.

55. Furthermore, as many markets may be concerned, albeit in different degrees, the Commission will normally focus its analysis on those markets where the effects of the aid are most obvious and/or prominent.

## **Box 2: Products and markets concerned**

### ***Products<sup>35</sup> concerned***

In order to trace the effects of the aid, it is first necessary to identify the products concerned. This will allow identifying its effects on competitors and consumers.

The products concerned can be defined as the products whose producers change their behaviour resulting in price reduction, increase in output, increase in the acquisition of inputs, change of spending to develop a new or improved product, change of production process, market entry, market exit, change of location (see also Chapter 2).

To that extent, the products concerned can include not only those currently produced by the aid beneficiary, but also new ones resulting from product development.

In some situations where the aid does not target a specific activity, but rather supports the aid beneficiary as a whole,<sup>36</sup> the products concerned are all the products produced by the aid beneficiary.

### ***Product markets concerned***

Identifying the competitors affected by the aid is equivalent to delineating the product markets where the aid may lead to a shift of demand away from competitors and in favour of the aid beneficiary. This shift of demand may occur only in so far as competitors have products that are substitutable with the products concerned. In addition, markets directly linked to the shift of demand will be concerned, as competitors will also reduce their purchase of inputs or complementary goods. The affected consumers are those purchasing goods on these markets.

The product markets concerned comprise all those products which are regarded by the consumer as interchangeable or substitutable with a product concerned as well as the related input markets (i.e. suppliers of the aid beneficiary)<sup>37</sup> and complementary markets.<sup>38</sup> Factors relevant to the delineation of the product market concerned include inter alia product characteristics and intended use, consumer preferences, evidence of substitution in the recent past, barriers and costs associated with switching demand of potential substitutes, shifts in demand following price decreases, elasticities and cross-price elasticities for the demand of a product. Regard should also be had to the effect of the aid on substitutability (e.g. by inducing a price decrease of a product which would not previously have been regarded by customers as substitutable with the cheaper products of other undertakings).

<sup>35</sup> The term “*product*” is used here as a generic term, which covers not only commercial products but also services.

<sup>36</sup> For instance in the case of rescue and restructuring aid.

<sup>37</sup> However, markets further up the input-chain (i.e. input markets of the input markets) will normally not be considered.

Supply side substitutability may also play a role in delineating affected markets when the beneficiary can rapidly enter or expand in those markets. Relevant factors to identify this potential entry are, inter alia, the existence of economies of scope between two markets (e.g. if two products require the same production facilities) and supply cross elasticity (ability to switch production rapidly).

It will have to be considered on a case by case basis which product markets will be analysed in detail, on the basis of the competitive situation and the likelihood that the aid has an effect on such related markets.

### ***Geographic markets concerned***

Once competitors and consumers affected by the aid have been identified, it is also important that they can be located. This is in particular the case, as the cross-border effects of State aid are essential to be monitored. However, even in the case of national or sub-national geographic markets, aid can negatively affect trade, e.g. by creating barriers to establishment by undertakings from other Member States<sup>39</sup>

As for the delineation of product markets concerned, demand considerations should be the main tool to define geographic markets. Factors relevant to the assessment include, inter alia, the nature and characteristics of the products, the existence of entry barriers, transportation costs, consumer preferences, appreciable differences in the undertakings' market shares between neighbouring geographic areas or substantial price differences.

56. The Member State granting the aid is expected to provide all relevant evidence available in order to assist the Commission in its evaluation. While assessing the effect of an aid on competition the Commission may take into account the following indicators:

Aid characteristics (e.g. aid amount; beneficiary selection process, duration and repetition of the aid; effect on the beneficiary's costs).

Structure of affected markets (e.g. market concentration, number and size of firms existence of market power, product differentiation, barriers to entry and exit, dimension of the product and geographic market concerned<sup>40</sup>).

Industry/market characteristics (e.g. markets with overcapacity, inefficiencies at the level of the beneficiary (productivity), importance of innovation, feasibility of moving production facilities).

The aid, market and industry characteristics listed above should not be seen as stand alone indicators, but should be considered together with the other information about the aid measure concerned like the market failure addressed or the objectives of common interest pursued.

---

<sup>38</sup> I.e. markets comprising those products that are used in conjunction with the product concerned.

<sup>39</sup> See e.g. Case C-280/00 Altmark Trans and Regierungspräsidium Magdeburg [2003] ECR I 7747 ('Altmark'), paragraphs 77-79.

<sup>40</sup> Markets that are broader than national will normally affect trade between Member States; national markets may nevertheless affect trade via upstream, downstream or complementary markets concerned.

## 6. BALANCING NEGATIVE AND POSITIVE EFFECTS

### *The balancing exercise*

57. The last and decisive step in the compatibility analysis is to evaluate whether the Member State has demonstrated that the positive effects of the aid, if any, outweigh its negative effects. While this exercise can only be done on a case-by-case basis (for individual measures as well as for schemes as a whole) and it is therefore not possible to generally predict how the balancing will turn out in a given case, a few general principles may nevertheless be set.
58. To balance positive and negative effects, it is necessary to first evaluate and measure them in qualitative terms as well as, where possible, in quantitative terms, and make an overall assessment of their impact on producers and consumers in each of the markets concerned. To that extent, using a social welfare standard<sup>41</sup> facilitates an analytical description of the common interest, by disentangling effects of a different nature on different actors.
59. The positive effects of the aid are directly linked to the change of behaviour of the aid recipient which allows reaching the desired common interest goal. In the case of an efficiency objective, the positive effects can be described in terms of an increase or decrease in activity in an output market which is regarded as beneficial to the common interest. For instance, environment aid reduces the production of hazardous substance; R&D aid increases R&D activity, thus leading to new or improved products. In the case of an equity objective, the positive effects correspond to the provision of the equity-enhancing output or to a change in the way output is delivered: it is located in a different region, or different inputs are employed (e.g. handicapped workers). In the same manner, effects on input markets can be described as change of activity in relation to what would have happened without the aid (e.g. more sales for suppliers to the firm that has moved to the aided region, more jobs or higher salaries for workers in the region). Positive effects for consumers may result from lower prices in the long run, higher product choice, quality or innovation.
60. The negative effects on competition and trade also derive from the change of behaviour of the aid recipient. As discussed in the previous section, the significance of the distortion of competition can be assessed in terms of effects on competitors and input suppliers (in particular for aid that triggers a change in location). The effect on consumers also depends on the reaction of competitors. In any case, the cost of the aid is considered negatively, so that an aid cannot be approved unless it generates some positive benefits beyond a simple transfer of funds to the aid recipient.

---

<sup>41</sup> In economic theory, consumer welfare is usually defined as consumers' surplus in all markets, i.e. the difference between the willingness to pay for a good and the price of this good. Reciprocally, producer welfare can be equalled with producers' surplus, i.e. the amount that producers benefit from by selling at a market price that is higher than the marginal cost of production. Social welfare takes into account not only the sum of consumers' and producers' surpluses, but also how welfare is distributed across countries and citizens. Social welfare thus integrates efficiency elements (i.e. by looking at how much wealth is created by affecting consumers' and/or producers' surpluses) as well as equity elements (i.e. by looking at how this wealth is divided between Member States and citizens). A social welfare standard takes into account all the effects that may be generated by the aid.

61. Even if aid schemes or aid to particular firms will be considered on their own merit, cumulative effects can be considered. That is, the addition of aid to a large number of small firms may have the same effect as a large amount of aid granted to a single firm. Also, recurrent aid in one and the same sector of a particular Member State may lead to negative effects by strengthening this particular sector to the detriment of other Member States.
62. The identification of the common interest at EU level involves the weighing of policy considerations. Some policy objectives may aim at more or less intangible benefits. Others may involve benefits that are not readily commensurable with possible negative impacts on competition and trade, and for which establishing appropriate relative weightings necessarily entails a wide margin of assessment. This being said, analysing the effects of the aid through a social welfare standard may assist in systematising such an evaluation by aiming, wherever possible, towards defining a unit of measurement of certain economic effects – positive and negative – of the aid, and thereby making a valuable contribution to the overall assessment of the impact of the aid.

### *Magnitude of effects*

63. The Commission is aware that it will in many cases not be possible to have a very precise quantification of the effects of a given State aid measure. But in most cases it should be possible to identify orders of magnitude of the effects involved.
64. It will also be taken into account that some effects (typically short-term effects on quantities and prices) will often be easier to quantify than other, equally important ones (e.g. long-term effects on incentives to invest or innovate), so that an increase in total welfare in the short term should not directly lead to the acceptance of the measure.
65. If positive or negative effects can be quantified, a common measurement unit should be used in order to ensure comparability (e.g. impact in money terms, number of jobs, turnover generated and/or displaced).
66. For instance, benefits and harm on competitors can be quantified through estimates of increased or lost sales, profits or jobs. Benefits (and respectively harm) for citizens can be expressed in terms of estimated monetary gains resulting from price decrease (respectively price rise) in the long term. Positive effects for citizens resulting from higher product choice, quality or innovation may be more difficult to quantify in numeric terms, but orders of magnitudes could nevertheless be attached to these effects.
67. In some instances, it may be difficult to determine how much consumers will value the quality or novelty or other non-price characteristics of goods and services. This should not prevent Member States from attempting to assess the benefits attached to it for citizens. The Commission will take into account consumer surveys or marketing research or expert opinion provided by Member States, or policy assessment, as for instance expressed in Community or national policy documents, or on its own judgement, to appreciate the magnitude of such positive effects.
68. Furthermore, the assessment of positive effects in relation to equity considerations is also likely to entail a large margin of appreciation. The different weighting of effects

on different regions or groups of people may be based on statistical indicators,<sup>42</sup> showing the gaps between these groups. Such an approach can help establishing different scales for the assessment of the positive and negative effects.

69. In any case, the balancing exercise should express the effects using a set of factors and a description of the effects that is as specific and precise as possible. This way, even without quantification, it should be possible to balance the positive and negative effects and compare them.

### *Operational indicators*

70. Once the Commission has followed the methodology presented above to assess positive and negative effects, there may be situations where it is difficult to balance them, in particular because they can not be readily quantified or compared. The following indicators may facilitate the balancing between positive and negative effects. They are not binding and only indicative. No one indicator would be sufficient and a combination of indicators would be required in making the decision. Moreover, and most importantly, these indicators should not be seen as avoiding the full application of the balancing test. It should also be considered that, as a general rule, State aid is prohibited and can be authorised only by derogation to this general principle. This implies that, in case of doubt, the Commission is more likely to prohibit the aid.
71. The Commission is more likely to take a more negative stance if for example:
- The distortions of competition are almost certain and the State aid mostly benefit the recipient of aid
  - The aid is an operating aid that merely supports particular output or price levels
  - The aid amount is very significant and the positive effects are very limited compared to the cost of aid
  - The positive effects are merely located in the Member State granting the aid whereas substantial negative effects are felt in a number of other Member States
  - The aid significantly increases social and/or regional disparities and/or leads to environmental damages or pollution
  - The aid generates significant and durable distortions of competition and the aid beneficiary is a dominant company, whose market position will as a result be reinforced.
72. By contrast, the Commission is more likely to take a positive stance if, for example,
- the positive effects are almost certain (e.g. by the design of the aid), whereas the negative effects are less likely

---

<sup>42</sup> Cf. methodology used in the Regional Aid Guidelines

- the aid is necessary to generate positive effects that are very significant (and notably greatly exceed the aid amount), that benefit many Member States and that have demonstrated strategic importance for the common European interest
- the aid is well targeted and the benefits are located in underdeveloped regions or go to socially underprivileged groups and the Commission has found that the aid is limited to the net extra costs to compensate for social/regional handicaps
- the aid results in important positive spill-overs to product markets other than the product markets concerned, so that competitors and consumers in these markets may also benefit from these spill-overs
- the aid does not significantly distort the proper functioning of the internal market and does not produce significant disparities between undertakings established in different Member States and/or in the location of the production factors within the EU
- the aid results in clear positive effects for citizens, including in the long term whereas negative effects are limited and do not significantly hamper competition

#### ***Remedial measures***

73. If the balancing shows that the negative effects outweigh the benefits, the Commission may prohibit the aid, or ask for remedial action, either in the design of the aid, or in the harm to competition.
74. In relation to the design of the remedial measures, the Commission will examine inter alia the following elements:
  - Reduction of the aid amount, of the aid intensity, or the scope/target of the aid (activities or markets covered) to make the measure proportional.
  - Reduction of the selectivity of the measure, for instance by using an open selection procedure for the aid beneficiary or by opting for a general scheme, and avoiding any bias in favour of companies with market power.
  - Limitation of the possibility for cross-subsidisation by increased transparency and separation of accounts, or by separation of activities in different companies.
  - Ensuring an appropriate corporate governance structure of the company.
75. In relation to the impact on competition and trade, the Commission may consider for example the following elements:
  - Reduction in the production capacity of the aid beneficiary
  - Divestiture of assets
  - If proper monitoring can be ensured, behavioural commitments by the beneficiary to prevent foreclosures (e.g. guaranteed access to network or other essential facilities)

- Commitments by the Member State to open markets, e.g. liberalisation measures, easing of technical and non-technical barriers
- Open licensing of Intellectual Property Rights/standards.

## Annex I

List of exemplary cases in which the balancing test has been applied

### RDI

- N 602 / 2007 - Soutien de l'AII en faveur du programme MaXSSIMM, decision of the 20.05.2008, the public version is not available yet
- N 469 / 2007 - Soutien de l'Agence de l'innovation industrielle en faveur du programme « QUAERO», decision of the 11.03.2008, the public version is not available yet
- N 447 / 2007 - TURBOMECA (groupe SAFRAN), OJ C 94, 16.04.2008
- N 435 / 2007 - Soutien de l'Agence de l'innovation industrielle en faveur du programme « MINImage», 30.01.2008
- N 349 / 2007 - Soutien de l'agence de l'innovation industrielle au PMII OSIRIS, OJ C 304, 15.12.2007
- N 195 / 2007 - Rolls-Royce Deutschland Ltd. & Co. KG - OJ C 118, 15.15.2008
- N 185 / 2007 - Soutien de l'Agence de l'innovation industrielle en faveur du programme « NANOSMART» , OJ C 284, 27.11.2007
- N 112 / 2007 - THESEUS, OJ C 227, 27.09.2007
- N 89 / 2007 - Projet d'aide de l'Agence de l'innovation industrielle au PMII HOMES, OJ C 275, 16.11.2007
- N 887 / 2006 - Projet Bernin 2010, OJ C 200, 28.08.2007
- N 854 / 2006 - Soutien de l'agence de l'innovation industrielle en faveur du programme mobilisateur pour l'innovation industrielle TVMSL, OJ C 182, 04.08.2007
- N 708 / 2006 - Soutien de l'Agence de l'innovation industrielle en faveur du programme « BioHub », OJ C 67, 23.03.2007
- N 674 / 2006 - Soutien de l'Agence de l'innovation industrielle en faveur du projet NeoVal, OJ C 120, 31.05.2007

### Training

- C 18 / 2007 - DHL Leipzig Halle, OJ C 213, 12.09.2007
- C 35 / 2007 - State aid to Volvo Cars Gent, OJ C 243, 7.11.2007
- C 23 / 2007 - Vauxhall - Ellesmere port, OJ C 243, 17.10.2007
- N 541 / 2006 - Training Aid to Fiat Auto, OJ C 220, 20.09.2007



- C 14 / 2006 – General Motors Antwerp, OJ C 210, 1.09.2006

### **Broadcasting**

- C 25/2004 - DVB-T Berlin-Brandenburg, OJ L 200, 22.07.2006

### **Broadband**

- N 570 / 2007 - Broadband in rural areas of Baden-Württemberg, OJ C 282, 24.11.2007
- N 117 / 2005 - Broadband aggregated procurement – Scotland, OJ C 204, 26.08.2006
- N 473 / 2007 - Broadband connections for Alto Adige, OJ C 289, 01.12.2007
- N 475 / 2007 - National Broadband Scheme – Ireland, OJ C 282, 24.11.2007
- N 118 / 2006 - Development of broadband communication networks in rural areas, OJ C 296, 06.12.2006
- N 284 / 2005 – Regional Broadband Programme: Metropolitan Area Networks ("MANs"), OJ C 207, 30.08.2008

### **Risk Capital**

- N 521 / 2007 - Cluster Fund 'Start-up!'. Risk Capital Scheme. Germany (Bavaria), OJ C 100, 22.04.2008
- N 287 / 2007 - Business Expansion Scheme (BES), incorporating the Seed Capital Scheme (SCS), OJ C 238, 10.10.2007
- N 263 / 2007 - Technology fund TGFS, Saxony, Germany, OJ C 93, 15.04.2008
- N 330 / 2006 - Berlin Kapital Fonds, OJ C 67, 23.03.2007
- N 599 / 2005 - Supporting the creation of Seed Capital Funds, OJ C 240, 05.10.2006

### **Others**

- N 581 / 2007 - Scheme for reduced social security contributions in certain service sectors, OJ C 59, 04.03.2008

List of exemplary Regional Aid cases in which a market definition was carried out

- N 767 / 2007 - LIP - RO - Ford Craiova, OJ C 248, 30.04.2008
- N 582 / 2007 - LIP - DE - Propapier PM 2 KG, OJ C 131, 29.05.2008
- N 907 / 2006 - MSF 2002- Matrai Eromu, OJ C 227, 27.09.2007

- N 900 / 2006 - MSF 2002 - CELBI , OJ C 271, 14.11.2007
- N 899 / 2006 - MSF 2002- Artensa, OJ C 227, 27.09.2007
- N 898 / 2006 - MSF 2002 - Repsol Polimeros, OJ C 220, 20.09.2007
- N 872 / 2006 - MSF 2002 - Qimonda, 30.01.2008, the public version is not yet available
- N 863 / 2006 - MSF 2002 - Avancis, OJ C 227, 27.09.2007
- N 850 / 2006 - MSF 2002 - Q-Cells, OJ C 270, 13.11.2007
- N 810 / 2006 - AMD, Dresden, MSF 2002, OJ C 246, 20.10.2007
- N 564 / 2006 - MSF-2002-PT about the Future - Empresa produtora de Papel S.A. OJ C 291, 05.12.2007
- N 549 / 2006 - MSF-2002-IT Atlantica Invest AG, OJ C 213, 12.09.2007
- N 409 / 2006 - MSF-2002-DE HighSi GmbH, OJ C 77, 05.04.2007
- N 17 / 2006 - First Solar (MSF), OJ C 259, 27.10.2006