

THE EUROPEAN COMMISSION
STATE AID ACTION PLAN

AFEP COMMENTS

On 7 June 2005 the European Commission presented its Action Plan for a comprehensive reform of State Aid policy; the reform program will be carried out over the period 2005-2009. In this document the Association Française des Entreprises Privées, AFEP presents its views on the guiding principles elaborated by the Commission.

AFEP represents at present more than 85 of the top French private sector companies. The stock market value of the companies which belong to AFEP amounted in 2004 to 800 billion euros, with more than 4,5 million employees, and combined turnover of over 1000 billion euros. The market capitalisation of the French AFEP member companies quoted on the stock exchange was 800 billion euros at the end of 2004.

The purpose of AFEP is to present the views of large French companies to the European Institutions and the French authorities, mainly with regard to the drafting of non-sectoral European Community legislation (on the economy, taxation, company law, financial information, competition, social regulations, employment legislation, environment, intellectual property rights, etc.).

The Presidents of AFEP's member companies are actively and directly involved in the definition of the main lines of economic and social policy to be submitted to the European and national authorities, as well as deciding which actions to carry out in the interest of the growth of companies in a market economy.

AFEP member companies favour an industrial policy that is firmly rooted in the dynamism created by the Lisbon Strategy and focused on the sectors that are likely to ensure growth and employment (innovation, research and development, etc.). Therefore the insertion of the State Aid reform into the framework of the Lisbon Strategy constitutes a positive element. Nevertheless, this strategy cannot be the sole criterion for judging whether State Aid is warranted, insofar as there are sometimes other excellent reasons for granting such aid, for instance to traditional economic sectors that are highly exposed to international competition.

Though aware of the nature of the Action Plan published by the Commission, conceived first and foremost as an orientation guide to the reform program, companies note that numerous points referred to by the Commission raise questions to which answers cannot be found directly in the consultation document. AFEP also wishes to contribute to future reflection on the basis of more specific texts.

Since large companies are active on markets that reach beyond the borders of the European Union, the international environment in which their activity unfolds cannot be ignored in the context of State Aid reform. In particular, it is essential to take into account the various existing mechanisms of public assistance that can be granted to their competitors in those States that have not adopted any legislation in this area, or that operate within a less restrictive legal framework.

The international competitiveness of European companies should not be weakened by an excessively rigid application of European rules on State Aid as laid down by the Treaties. A detailed analysis ought to be conducted of the current practices of the Union's major competitors, distinguishing in particular amongst the major categories of aid and paying particular attention to State Aid to R&D and to the environment. Such an analysis could benefit from a predictive approach that takes into account the prospects for the development of State Aid on the international level. Such a comparison ought to start with a fairly broad definition of what can constitute State Aid (grants as well as financial incentives, public sector orders, preferential tariffs, etc.).

The major companies consider that the European Union ought therefore to retain the latitude necessary in a harsh international system of competition by not tying the quantity of State Aid ("less aid") too systematically to their quality ("better targeted"). Such an approach could in fact lead to an unnecessarily rigorous aid policy, whereby only those forms of assistance that correspond exactly to the Lisbon objectives could be judged compatible with the single market. This might weaken the position of European companies within international competition.

State Aid policy should also take note of public interventions that seriously distort competition, and should concentrate on the most obvious anti-competitive practices that lead to an imbalance among companies.

In any case, the option that has been put forward, namely, to extend to the WTO level the prohibition against certain forms of State Aid – modelled on the European framework – would not be capable of providing effective protection of European industry or of reducing existing disparities, unless mechanisms for imposing greater transparency were also put in place in the rest of the world. However, as things stand at present, such mechanisms still appear to be hypothetical only.

On the whole, companies are attentive to the process initiated by the European Commission to provide a clear and coherent legal framework for the control of State assistance (I). The adoption of mandatory deadlines, better access to information for companies, the creation of independent national authorities and the adoption of a general regulation for exemptions are but a few promising initiatives for improving legal certainty for businesses. The member companies would also like to see higher predictability in the Commission's measures in search of more specific criteria, especially for assistance given with regional goals in mind,

for aid to R&D and for some of the Union's voluntarist policies (the environment, social and regional cohesion, sustainable development, etc.).

Even though the member companies have noted the extent to which the Commission refers to economic aspects in order to formulate its aid policy, they encourage the Commission to place even greater emphasis on this economic dimension (II) by defining more clearly the notion of market failure and taking account of the notion of a relevant market. The consequences of differential treatment between SMEs/start-ups and large companies ought also to be considered. The equal application of the decisions of the Commission and of those of the jurisdictions in all Member States is yet another element of this reform.

I/ Establishing a clear framework to ensure the legal certainty of companies

On the whole, companies are attentive to the process initiated by the European Commission to provide a clear and coherent legal framework for the control of State Aid. The adoption of mandatory deadlines, better access to information for companies, the establishment of independent national authorities governing competition and the adoption of a general regulation for exemptions are welcomed initiatives for improving the legal certainty of businesses.

Companies are pleased to see that the Commission envisages modernising the practices and procedures in the area of State Aid (III/Action Plan, pp. 14ff). These aspects are indeed the source of great uncertainty for businesses, which often face far too long delays before decisions are made or have to deal with administrative complexities that are so great that they can impede the development of their projects.

Among the improvements mentioned by the Commission is the issuing of "best practices guidelines" (§ 50 of the Action Plan), which would also have the effect of fostering a greater sense of responsibility among the Member States. These guidelines would seem, in theory, to meet some of the main concerns of companies, insofar as they would take up the questions of delays and of information provision. Moreover, the creation of independent authorities and the regulation of exemptions are of particular interest to companies.

a) Delays

If the guiding principles announced by the Commission have not elicited any particular remarks on the part of companies, the latter do wish to stress the problem of delays, which is one of their chief concerns.

In this regard, one modification of the current procedural regulations would be highly desirable. As is already the case with the regulation regarding concentration, in the absence of a decision by the Commission within the set deadline, the aid in question ought to be deemed to be authorised and the Member State ought to be able to carry out the measures in question without further formality (modification of article 4, point 6 of the Council Regulation No 659/1999 on the implementation of State Aids). Strict and shorter procedural deadlines should, moreover, be mentioned in the procedural regulation.

b) Access to information

Companies (whether beneficiaries or complainants) often have a great deal of difficulty obtaining information relative to a situation of concern to them; for example:

- whether an aid or aid package has been notified or whether they come under an exemption regulation;
- if these companies need to be heard by the Commission during the procedure;
- when they wish to find out the status of a procedure or obtain information that the Commission has available.

This lack of transparency is all the more regrettable because, even if the procedure for State Aid is carried out with the Member States, the risk of recovery is nevertheless borne by companies. The latter wish, therefore, to have access to the relevant information as regularly as possible.

Moreover, companies consider that the beneficiaries of individual aids (especially aids to restructuring) ought to be associated more closely with the procedure, while the beneficiaries of aid packages ought to be better informed of the measures taken by the state in order to make sure that these conform to the regulations.

The Commission's proposal to provide more information on the Internet (§ 50 and 58 of the Action Plan) should be encouraged. Undoubtedly, setting up independent authorities could also help meet these expectations.

c) The creation of independent authorities responsible for helping the Commission in the matter of State Aid (§ 51 and 53 of the Action Plan)

According to the Commission, these independent authorities could be put in charge of helping to implement the State Aid rules, and in particular for the "detection and provisional recovery of illegal aid [and] execution of recovery decisions".

Companies take note of the intention to create these authorities, but more information is needed, e.g. as to their composition, powers and degree of independence, before an opinion on them can be formed.

Therefore:

- does the Commission intend to define the composition and mission of these authorities, or will it be up to the Member States to establish them?
- Are these to be new authorities, or could their role be carried out, if appropriate, by existing bodies?

Companies are wondering about the precise role to be assigned to these authorities, as foreseen at this stage by the Commission in § 51, and about the network of authorities or points of contact that might be set up "in order to facilitate the flow of information and exchange of best practices" mentioned in § 53.

In their capacity as points of contact, these authorities could be a useful source of information for companies themselves, inasmuch as the authorities could:

- respond to requests for information by the different actors;
- verify that notification has duly been made by Member States;
- elaborate databases;
- question Member States about the aids they have granted, their regularity, the exemption regulation under which such aids may fall;
- help public bodies.

In any event, it would be helpful to specify the way in which companies might gain access to the information that is thus distributed and that would likely serve as a guide to European policy in the area of State Aid.

d) Issuing a general block exemption regulation (§ 32 and 35 of the Action Plan) that would include categories of aid to support R&D (§ 36 of the Action Plan)

Companies welcome the proposals of the Commission in view of adopting a general block exemption regulation that would dispense Member States from the obligation of notifying certain categories of aid.

Thus the Commission intends also to include “a broader range of exemptions, notably as regards aid to support SMEs and R&D” (§36).

Such measures are pragmatic, and would meet a real need on the part of businesses. Those forms of aid that do not currently fall into an exemption category, such as aid to R&D or to the environment, could thus be approved without having to wait for a green light from the Commission or having to undergo an examination on a case-by-case basis, something that is ill-suited to objectives of such a general nature.

However, in order to be effective, this general exemption regulation by category needs to be elaborated with great care. It would be useful, for instance, to know the legal bases on which the Commission intends to permit “national jurisdictions to apply block exemptions directly not only by declaring the compatibility but also the incompatibility of certain aid” (§ 59 Action Plan).

II/ Companies encourage the Commission to give more prominent consideration to the economic aspects of State Aid

Although companies have noted the extent to which the Commission refers to economic aspects in elaborating its aid policy, they encourage it to give even more prominent consideration to the economic approach, in conformity with § 21 of the Action Plan, in which the Commission states that it will “strengthen its economic approach to State Aid analysis. An economic approach is an instrument to better focus and target certain State Aids towards the objectives of the re-launched Lisbon Strategy”.

Thus, by suggesting that investment aid to large firms be limited to the least-developed regions, § 42 of the Action Plan is based on an excessively general and restrictive vision. This approach does not take sufficient account of the market situation and of the competition between Europe and other regions of the world.

The notion of market failure needs some clarification, both in its definition and in the way in which the Commission intends to use it. Moreover, aid regimes on behalf of pertinent markets need to be envisaged. The consequences of differential treatment between SMEs/start-ups and large enterprises should also be considered. Finally, the equal application of the decisions of the Commission and of the jurisdictions of all Member States is also at stake in this reform.

a) Better definition of the notion of ‘market failure’ and its use by the Commission

The subject of a long discussion in § 23 of the Action Plan, this notion nonetheless raises questions for the member companies, who find it difficult to grasp its contours or its future use.

- its definition

Market failure cannot be defined as a complete absence of a market, for in that case one could no longer speak in terms of aid, inasmuch as no restriction of competition or impact on intra-community trade could be identified. Beyond this certainty, it is difficult to discern the contours of this notion.

It would therefore be useful if the Commission were to define the meaning of the term more concretely than simply that market failure is “a situation where the market does not lead to an economically efficient outcome.” (p. 7) Such a definition is far too general and formal to serve as a true guide or criterion for action.

- its use

The concept of market failure seems to be used by the Commission primarily as a justification for a State Aid, that is to say, at the stage of the analysis carried out in view of article 87-3 of the Treaty. Yet it seems hard to imagine that it would not be used also at the stage of deciding on an aid in light of article 87-1.

It would therefore be desirable that the Commission make it clear that not only may market failure be considered as one of the “possible justifications” for State Aid, but that in legal terms as well, this notion would serve as a sufficient albeit not a necessary condition for justifying an aid.

b) The need to envisage an aid system in terms of relevant markets

It is essential to determine State Aids by taking into account the competitive situation at the global level. If, in third countries, certain sectors receive subsidies or other forms of public aid, this situation ought to be taken into account in determining the aid policy to be implemented in Europe.

For example, in the United States public financing for research and development is considerable, representing as it does between 11% and 21% of the R&D provided by businesses¹.

¹ Beffa report “Towards a new industrial policy” (15 January 2005), p. 22.

Similarly, in Japan, even if public spending on R&D represents an average of only 1% over the last five years, the government has since 1948 adopted a policy of coordination supported by businesses, the universities and the state (calling upon academics for technology transfers, support for the training of engineers in public schools, technology transfers from public laboratories enjoying fiscal advantages, etc.)².

In addition, the notion of a relevant market should systematically be taken into account when State Aids are being considered. Prior to any analysis of competitiveness detached from an international or European dimension, this notion would, in fact, help guide the decision whether to accept or refuse the granting of an aid.

c) Envisaging the consequences of any differential treatment between innovative SMEs/start-ups and large firms

As envisaged by the Commission in § 21 of the Action Plan, the economic approach used for State Aids would be guided essentially by the Lisbon Strategy, centred on innovation, research and development, etc. From this approach, combined with a more focused Regional policy (II.6 of the Action Plan), in particular given the statement that “investment aid to large firms [is to be used] sparingly” (§ 42 of the Action Plan; cf. remark above), it becomes evident that State Aid is to be used primarily for small or medium-sized entities such as innovative SMEs or start-ups, in the less-developed regions.

This policy orientation has prompted the following comments on the part of AFEP member companies.

Without calling into question the aid to SMEs, the large firms wish to draw the attention of the Commission to the risk of “scattering” that might result from such a policy. In face of third-country competitors that are far more structured (cf. the remarks above on the United States and Japan), the economic impact of such dispersed aid would be very limited.

It would therefore be undesirable to exclude the possibility of also approving investment aid to large firms or consortia of large and small companies joining together for a more substantial economic project with a strong research and innovation component, within which the work of SMEs would be reinforced and energized by the aid in question.

d) In search of transparency within the European Union

At present, where the Commission sees a selective advantage, it deduces quasi-automatically a distortion in competition. Yet this analysis is not always correct, notably because of strong disparities among the legislations of Member States (at the fiscal, social levels, etc.), among producers and among their production costs. These different forms of aid are not always taken into account or even known, and therefore it is in these areas as well that the Commission should seek transparency in order to establish a diagnostic tool that is as precise as possible, before envisaging a general aid policy.

A competitive approach, based on a prior definition of the market where the beneficiary company is active, on a clear identification of the real competitors faced by the beneficiary and on the effect that this advantage may have on the production costs and the price of the

² *Ibid.*, p. 24.

goods produced by the company concerned, would permit a more accurate assessment of the real impact of aid on the competitors of the beneficiary/beneficiaries, taking into account the global effect of the controversial measure.

Taking account of the specific objective of State Aids, the definition of the market cannot be the same as the one used in dealing with anti-competitive practices. For this reason, placing an economic activity squarely within the framework of the international competition it faces becomes particularly important (see above).

Only those competitors who are in the same situation as that of the beneficiary company ought to be taken into consideration in the examination of the restrictions on competition.

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