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Comments on the State Aid Action Plan

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1. Proposed new concepts

1.1. Market failure

The SAAP gives considerable weight to the existence of market failure as a justification for the granting and authorisation of state aid. This is a welcome development.

As demonstrated by economic theory, the existence of market failure is a necessary but not sufficient condition for granting aid.¹ The potential benefits from the correction of the failure need to be large enough so as to outweigh the cost of raising and disbursing public funds and any other distortion that is created by the granting of aid.

Although the SAAP recognises that market failure is not a sufficient condition and suggests that Member States should demonstrate the existence of such failure, it does not indicate how Member States are expected to measure it. Some cases of claimed market failure are nothing else but outcomes which are not socially or politically desirable (i.e. there is no divergence between private and social costs or divergence between prices and marginal costs, which are the typical indicators of market failure).

More importantly, the SAAP does not indicate whether Member States will also be required to measure the size of the potential benefits from public subsidies and the size of the distortions caused by those subsidies.

Since markets hardly ever function perfectly, it would be rather easy for Member States to claim some degree of market failure. The relevant issue is whether that extent of failure can justify public subsidies.²

Another question that arises is whether aid will be allowed to vary from Member State to Member State according to the extent of market failure in each Member State. At present only the rates of regional aid vary across Member States. It is very likely, however, that different

¹ Please see P. Nicolaides and S. Bilal, *An Appraisal of EC Rules on State Aid*, *Journal of World Trade*, 1999.

² Please see P. Nicolaides and M. Kekelekis, *An Economic Analysis of EC Guidelines on State Aid for the Rescue and Restructuring of Companies in Difficulty*, *Intereconomics*, 2004.

types of market failure would vary in their intensity across the EU and over time. How will assessment of notified aid be affected by such variations?

1.2. National state aid authorities

The proposed establishment of a network of state aid authorities is welcome.³ More information is needed on the role and method of operation of this network. Given the fact that state aid is granted by many different authorities and that queries on the interpretation of the rules are raised all the time, a principal function of this network should be to clarify how the rules may be applied and post its interpretations and definitions on the internet so that it is accessible to all public authorities.

1.3. Third parties' rights

The SAAP suggests that the Procedural Regulation 659/1999 should be amended and lists a number of issues for consideration. However, strengthening the rights of third parties (beneficiaries and competitors) in the procedures is not included in that list.

The identification and proper economic analysis of market failures would be better achieved if the views of the market players, that is to say the beneficiaries and competitors, are to be taken into account, particularly following the initiation of proceedings. That way, the Commission would be better placed to verify claims as to the existence of a failure in a particular market and proceed with its assessment accordingly [e.g. competitors could corroborate or challenge claims that certain products are not provided by the market or certain activities would not take place without state aid].

2. Existing concepts

There is a need for clarification of the concepts of R&D (and the demarcation of its three categories) and of investment. Such clarification should be accompanied with as many examples as possible.

In addition, it should be explained (i) whether the threshold for de minimis aid applies to independent undertakings or separate legal entities (ii) what happens when the same legal entity with operations in more than one Member State obtains de minimis aid from all those Member States and (iii) whether aid from Community sources should be taken into account when determining whether the de minimis threshold has been exceeded.⁴

More broadly, there is an urgent need for clarification of the relationship between national aid that falls within Article 87 and Community aid and whether there are any circumstances in which Community aid could be regarded as state aid.

³ Please see P. Nicolaidis, Decentralised State Aid Control in an Enlarged European Union: Feasible, Necessary or Both? World Competition, 2003.

⁴ Please see P. Nicolaidis, Puzzles of State Aid: Structural Funds, Cumulation and De Minimis, European State Aid Law Quarterly, 2005.