

Submissions on European Commission's State Aid Action Plan Less and better targeted state aid: a roadmap for state aid reform 2005-2009

- 1 Linklaters welcomes this opportunity to comment on the Commission's state aid action plan (SAAP), which was adopted on 7 June 2005¹.

We wholly support the Commission's stated aim to streamline state aid policy, in particular by:

- increasing legal certainty in state aid proceedings;
- refining the economic approach to state aid;
- increasing the transparency of the state aid procedure; and
- enhancing the adjudication process.

A The Notion of State Aid: increased legal certainty

- 2 In line with the Commission's desire to increase **legal certainty**, Linklaters believes that there is a pressing need to define the basic concepts of state aid policy. We understand that former Competition Commissioner Mario Monti had intended to propose the adoption of guidance on the concept of state aid. There is no indication in the SAAP, however, that it is the Commission's intention to pursue this idea.
- 3 Because of the proliferation of – sometimes inconsistent – Commission decisions, which are not always in line with Court judgments, it is becoming increasingly difficult for those involved in or affected by state aid proceedings to assess whether a particular measure may constitute aid. This situation creates legal uncertainty for:
- undertakings, including beneficiaries, competitors and third parties, and their legal representatives, in assessing whether a measure may constitute illegal aid that is subject to recovery proceedings;
 - Member States, in deciding whether or not to notify a measure; and
 - national judges, in exercising their competence to assess whether or not a measure constitutes aid. In particular, clearer guidance on the notion of state aid in this context would facilitate private enforcement, which the Commission is keen to promote (see further paragraphs 26 onwards, below). In practice, the more complex issue to be determined by national judges is whether a measure constitutes state aid (the other issue, whether such aid has been notified, being more straightforward).
- 4 On the one hand, the Commission's application of the state aid rules is becoming broader and wider, tending to create legal uncertainty²; on the other, ECJ judgments in recent years

¹ http://europa.eu.int/comm/competition/state_aid/others/action_plan/saap_en.pdf

² For example, France Telecom, C(2004)3060 and C13/A/03, 2 August 2004 and EDF, C(2003)4637 and 2005/145/EC, 16 December 2003.

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have tended to narrow the definition of aid³ and Commission decisions do not always appear to apply the state aid rules consistently with the ECJ's dicta⁴.

- 5 In paragraph 63 SAAP, the Commission announces that it will issue a "consultation document on the aid element in different forms of aid". Linklaters would welcome such a consultation but it is unclear whether the document is intended to address the concept of state aid.
- 6 In any event, we request that the Commission issue **detailed guidelines** that clarify its policy on the definition of aid in line with the ECJ's case law. The guidelines should cover the following concepts.

6.1 The principle of the private investor acting in a market economy

The Commission's criteria for applying the **private investor test**, which was originally developed by the Courts, have become so complex that public authorities and public undertakings rarely comply with them in practice. Moreover, the Commission's application of the test is inconsistent with the behaviour of most private investors.

In the interests of legal certainty, coherence, and transparency, Linklaters therefore asks the Commission, first, to acknowledge the validity of the test and, second, to clarify its policy. In this context, we request that the Commission address the issue of discrimination between public and private undertakings and formulate a policy for the application of the private investor test, in particular, in the following situations:

- commercial contracts;
- guarantees;
- investments; and
- privatisations.

6.2 Selectivity

Linklaters suggests that the Commission clarify the criteria for determining which measures it considers to be **selective**. Currently, a number of Commission decisions on selective measures appear to be irreconcilable⁵.

In the same vein, we suggest that the Commission clarify, with examples, the **notion of "nature and general scheme of the system"**, introduced in the Commission's 1998 notice on the application of the State aid rules to measures relating to direct

³ For example, in Case C-379/98, *Preussen Elektra AG v. Schlesweg AG* [2001] ECR I-2099, the ECJ reiterated the principle that Article 87(1) EC applies only to advantages granted directly or indirectly through State resources and not to those transferred from private sector resources and in Case C-482/99, *France v. Commission* [2002] ECR I-4397, the ECJ narrowed the scope of Article 87(1) EC to cases in which aid measures are *imputable* to the state.

⁴ For example, in Case NN 49/99, *Régimen transitorio del mercado de la electricidad*, para. 63, the Commission left open the application of the *Preussen Elektra* judgment.

⁵ No clear practice can be derived from the various Commission Decisions concerning infrastructure project. For example, both in Case N 517/98, *South Wales European Freight Terminal* and in Case N 550/2001, *Partenariat public/privé pour la construction d'installations de chargement et de déchargement* the Commission acknowledged that the financing of an infrastructure did not constitute aid if it was made available to all potential users on non-discriminatory terms. Neither in case N 308/2002, *Richtlinien über die Gewährung von Zuwendungen zur Förderung von Investitionen zum Erwerb, Erhalt, Bau und Ausbau von Eisenbahninfrastrukturen im Land Sachsen-Anhalt* nor in Case N 124/02, *Northern Ireland Gas Pipeline Proposal*, however, did that principle appear to feature in the Commission's reasoning.

business taxation⁶. It appears that the notion applies in such narrow circumstances so as to cast doubt upon its practical value.

B The Compatibility of State Aid: refining the economic approach

- 7 Linklaters welcomes the Commission's aims to refine its **economic approach** in state aid proceedings and to focus its resources on cases likely to create the most serious distortions to competition and trade.
- 8 In practice, however, neither the Commission nor the Court of Justice analyse the two criteria for assessing illegal aid, as provided in Article 87(1) EC, namely that it "distorts or threatens to distort competition" but only "insofar as it affects trade between Member States". Linklaters strongly urges the Commission to subject both criteria to economic analysis in all its decisions and asks the Commission to confirm its approach in guidelines.
- 9 We also welcome the proposal to **increase the *de minimis* threshold** proposed in paragraph 38 SAAP. We suggest that such increase should be substantial in order better to address the condition that illegal aid must affect trade. We suggest that a threshold of €1 million over three years, as envisaged in earlier drafts of the Commission's LASA and LET proposals would be appropriate.
- 10 Linklaters suggests that the Commission provide a more detailed definition of the **concept of "market failure"**. We understand that the Commission intends to use the market failure criterion so as to allow aid that aims to correct market failures but ask the Commission to confirm that it does not intend to use the concept as a basis for prohibiting aid. We also ask the Commission to define the concept more clearly in order to allow Member States and beneficiaries to apply and benefit from it in practice. In paragraph 23 SAAP, the Commission gives examples of market failures but does not explain how the concept will be applied or how it relates to other principles of state aid. It appears that the concept is intended to be used across the board, as a basis for allowing or even encouraging aid in certain situations, but we urge the Commission to confirm that it will not be used as a general requirement for a declaration of compatibility. We also ask the Commission to clarify the interplay between the market failure concept and the other justifications of state aid, set out in Article 87.

C Procedure: transparency and the adjudication process

Transparency

- 11 Linklaters welcomes the Commission's objective to increase the **transparency** of state aid proceedings. In this context, we suggest that the Commission might aim to bring state aid proceedings in line with merger proceedings. In particular, we would welcome clear and easily accessible online information on the cases that have been notified.

Role of the beneficiary

- 12 We consider the passive **role of the beneficiary** to be a significant hurdle in state aid proceedings. We acknowledge that under the EC Treaty, Member States alone are responsible for notifying aid, and that, accordingly, Member States are the point of contact for the Commission. In practice, however, the Commission often agrees, in the interests of efficiency, to have direct contacts with the beneficiary. Whether or not this happens in practice, however, depends on the attitude of the individual case handlers rather than on

⁶ OJ C 384/3, 10 December 1998.

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any objective criteria: it is not based on a defined status of the beneficiary. In paragraph 50 SAAP, the Commission states that it will consider issuing best practice guidelines, in particular on its relationship with Member States. In the interests of legal certainty and coherence, we urge the Commission to define the role of the beneficiary in state aid proceedings.

- 13** In order further to enhance the efficiency of proceedings and strengthen the beneficiary's role, we suggest that, at least, copies of the following documents be provided to the beneficiary, in the same form as they are currently provided to Member States:
- the notification;
 - submissions made by national authorities;
 - any complaints; and
 - comments made by third parties after the publication of the opening of procedure in the Official Journal.
- 14** We consider a more defined role of beneficiaries to be important: the beneficiary is always better placed and often alone in being capable of responding to the Commission's requests for information. In almost every case, national authorities rely on the beneficiary to provide the factual and economic input needed for their response. It would therefore speed up proceedings if such requests, or at least copies of the requests, were sent directly to the beneficiary at the outset.
- 15** We would also welcome rules allowing beneficiaries to submit claims of confidentiality concerning the publication of Commission decisions directly to the Commission.
- 16** We would endorse a proposal to limit such an enhanced role of beneficiaries to cases involving individual aids⁷ as opposed to aid schemes⁸.

Injunctions

- 17** In paragraphs 50 and 58 SAAP, the Commission suggests increasing its use of **injunctions**. In the interests of legal certainty, we suggest that the Commission set out the criteria for adopting **information injunctions**. We endorse the Commission's aim to use such injunctions to reduce (rather than add to) procedural delays.
- 18** As regards **recovery injunctions**, we support the Commission's proposal to explore expanding their use as a deterrent mechanism. In this vein, we also suggest that the Commission explore imposing a financial penalty on Member States for granting illegal aid and breaching the notification procedure. The Commission might propose, for example, a requirement that recovered aid should be credited to the EU's budget rather than reimbursed to the defaulting Member State.

Case teams

- 19** We would welcome a **reorganisation of the state aid work within the European Commission**. State aid matters are currently dealt with by different Directorates General, notably those responsible for Competition, Transport, Agriculture, and Fisheries. This division of work is procedurally complex and can lead to inconsistencies. In particular, there is sometimes a lack of harmonisation between the Directorates Generals for Competition and Transport. Further, such a demarcation is no longer justified because both Directorates

⁷ As defined in Article 1(e) of Regulation 659/1999, OJ L83/1, 27 March 1999.

⁸ As defined in Article 1(d) of Regulation 659/1999, *ibid*.

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General purport to apply the same principles. In the framework of the Commission's proposed ambitious state aid reform, to be implemented within the next five years, we suggest that responsibility for state aid cases involving transport be reassigned to DG Competition. This would increase the transparency and coherence of state aid proceedings. On the other hand, we agree that the particularities of cases concerning fisheries and agriculture justify that their respective Directorates General remain competent.

Length of the procedure

- 20** We urge the Commission to set a **maximum time limit for state aid proceedings** as well as to establish a tight time table for compliance with the different stages of the procedure. In particular, in the interests of legal certainty and efficiency, we recommend an amendment to Article 7(7) Regulation 659/1999, because, as it stands, the Commission may decide to prohibit aid on grounds of insufficient information after proceedings lasting 18 months and an injunction from the Member State. We believe that even complex cases are capable of resolution well within 18 months from the date on which proceedings were opened. Indeed, in the case of large investments involving restructuring aid, such a long duration is incompatible with the economical constraints.
- 21** We suggest that Best Practices Guidelines (cf paragraph 50 SAAP) are not the appropriate mechanism for setting procedural timetables and that deadlines should be provided in the procedural regulation in order to (i) avoid any debate as to the respective obligations of the Member States on the one hand and the Commission on the other and (ii) provide remedies in the case of any infringement. We emphasise that not only Member States and beneficiaries, but also the Commission should be required to adhere to the timetable. In particular, we suggest that:
- the Commission should, within 2-weeks of notification, state whether or not a notification is complete, after which time the Commission may, of course, continue to be able to request additional information;
 - the deadline for adopting the final decision should be binding and no longer indicative; and
 - the overall timeframe should be reduced to 12 months, with a "stop-the-clock" provision at the request of the Member State.

Enforcement

- 22** The **sanction for non-notification** is currently enforced against the beneficiary and not the Member State: the Member State recovers illegal aid from the beneficiary. This situation is unsatisfactory and paradoxical in that it fails to create an incentive on the part of Member States to notify aid. At paragraph 58 SAAP, second indent, the Commission suggests introducing possible deterrence mechanisms, which we would welcome (see paragraph 18 above). However we believe that the *Boussac*⁹ case law must be maintained and that failure to notify does not release the Commission from its obligation to review the measure on its merits and possibly to declare aid compatible for the future.
- 23** In paragraph 51 SAAP, the Commission proposes that independent national authorities might act as the Commission's agents in enforcing the state aid rules. Linklaters is sceptical about this enhancement of the **role of the Member States**. If national authorities were designated to recover aid, burdensome implementation measures would have to be adopted to ensure consistency across the EU.

⁹ Case C301/87, *France v Commission* [1990] ECR 1307.

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- 24** We do not believe that it is appropriate to draw a comparison with the experience of accession Member States. First, it is not clear that the experience of pre-accession aid proceedings was as positive as the Commission suggests. Second, the accession process provided a strong incentive, which will be absent in the current Member States, notwithstanding their duties under Article 10 EC. Third, the national authorities in question did not have to recover aid but rather to decide on the existence of aid and compatibility.

Private actions

- 25** Linklaters endorses the Commission's proposal to promote **private enforcement**. We believe that enhanced private enforcement, adjudicated on by independent national courts, is the best and most efficient way to ensure recovery. We understand that a report on private actions in the area of state aid rules is due to be published shortly: its conclusions will be material to the Commission's SAAP.
- 26** We suggest promoting private actions both against the beneficiary for reimbursement of non-notified aid and against Member States for breach of the notification procedure. Currently, national judges appear to be reluctant to consider that the State is liable for non-notification of aid¹⁰. We would also welcome a legal basis for the Commission to act as **amicus curiae** in appropriate cases, as is the case under the antitrust enforcement regime.

Timing

- 27** We are disappointed that the Commission does not envisage presenting a **consultation document** on its proposal to amend Regulation 659/1999 until 2007. We urge the Commission to adopt a more aggressive timetable. We suggest that the proposal be adopted in 2006 so that the Council is likely to adopt the amendments by no later than 2007.

Linklaters, September 2005

¹⁰ For example, *Centre d'exportation du livre français*, Case No 1PA02761 and 01PA02717, Paris Administrative Court of Appeal, 5 October 2004.