Paris, 29 September 2005

Association Française d'Etude de la Concurrence

COMMENTS OF AFEC ON THE STATE AID ACTION PLAN OF THE COMMISSION

AFEC (*Association Française d'Etude de la Concurrence*) has read the 2005-2009 State Aid Action Plan of the Commission with great interest and has formed a broad working group on the proposed reforms. Hereafter, AFEC presents its comments and food for thought, some of which go along the same lines as those of the Commission. They can be summarised as follows:

- A first thought should be to consider enhancing the competition analysis of State aid, while keeping in mind that the objective of State aid policy cannot be completely identical with that of rules applicable to undertakings.

- A second thought should focus on the distinction between aid schemes and individual aid (in particular restructuring aid). Since the logic underlying those two types of aid differs, they cannot be approached in the same manner, whether it be in terms of substance or of procedure. The beneficiaries of individual aid should be associated more closely to the procedure, while the beneficiaries of aid schemes should be better informed of measures taken by the State to ensure their conformity with State aid rules.

- In addition, and after review of its exact definition, AFEC approves the use of the concept of market failure as one of the possible justifications for State aid.

- AFEC also shares the concerns of the Commission regarding the duration of the handling of cases and the lack of transparency. It encourages the Commission to seek all solutions likely to solve these problems, and in particular to go beyond the Best Practices Guidelines by considering amendments to the procedural regulation on those two points.

- AFEC supports the proposal of the Commission to be assisted by independent national authorities, but wishes that the common principles regarding both the role and powers of these authorities be set at the Community level.

- AFEC approves the will of the Commission to improve the recovery of illegal and incompatible State aid, and to clarify and reinforce the role of national judges.

- Finally, AFEC shares the proposal of the Commission to adopt a general block exemption regulation that exempts certain categories of aid from the notification obligation and it will make all necessary comments once the draft is circulated for consultation.

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INTRODUCTION

1. The present document is the contribution of the French Association for the Study of Competition (*Association Française d'Etude de la Concurrence*, hereinafter "AFEC") to the public consultation initiated by the European Commission following the publication of its State Aid Action Plan (hereinafter the "Action Plan") adopted on 7 June 2005.

2. AFEC is an association chaired by Mr. Guy Canivet, first Chairman of the *Cour de cassation*, that brings together academics, judges, civil servants and agents of regulatory authorities, in-house counsels and attorneys focusing on competition matters. AFEC is the French branch of the International League of Competition Law (LIDC). It set up an *ad hoc* working group to summarise the views of its members on the reform of State aid. This working was expanded to include companies not members of AFEC, but directly or indirectly concerned by State aid issues. AFEC wishes to be associated later on to the drawing up of the Commission's proposals.

3. Before presenting its comments on the Action Plan (II), AFEC will, based on the experience of its members, present a State of play of the application of Community State aid legislation (I). AFEC also wishes to present some brief comments on the Commission's proposal to adopt a draft general block exemption regulation (III).

4. As an introductory note, it should be stressed that the Action Plan touches upon numerous topics without pursuing them to their end. This comment, which is perfectly understandable given that this is a working document designed to foster a debate, does however render any analysis difficult. It will often lead to the formulation of open questions, with a view of identifying the stakes of the debate and the intentions of the Commission. More finalised comments will only be possible once the Commission presents drafts texts further down the road.

1. STATE OF PLAY

1.1 The European Union and the other economic groupings

5. The European Union is the only large economic grouping in the world to have developed State aid legislation. This situation is logical given the primary objective of European integration. State aid policy was conceived as a policy to accompany the internal market. This objective still remains valid today.

6. However, the reform of Community State aid policy must take into account the international environment in which companies operate. The existence of "subsidies" granted to companies in countries where such rules do not exist must be neither overlooked nor underestimated. Too rigid State aid rules in the European Union risk weakening the competitiveness of European companies that operate, for the majority of them, on worldwide markets.

7. In particular, the will expressed by the Commission to rely on a "refined economic approach" for State aid should notably lead to taking into account in a more systematic and pragmatic manner the potential effects on competition of different forms of support – whether direct or indirect – benefiting non-European companies, and that compete with European undertakings.

8. In addition, the Commission should ensure that equal conditions of competition be maintained at the worldwide level, notably within the WTO.

1.2 Comparison between Article 81 EC and Article 87 EC

9. A strong similarity between Articles 81 EC and 87 EC may be noted: comparable structure, in that a general prohibition is accompanied by exemptions; some identical application criteria (effect on trade between Member States and restriction of competition); and until 2004, the same system of prior notification.

10. However, it is worth noticing that the two subjects are not at the same evolution State.

11. The control of State aids is now at a level of development comparable to that of antitrust law in the 60's and 70's, that is a formalistic approach to agreements, an absence of real analysis of the market and of concrete effects on the market and competition of the analysed measures, and the existence of numerous exemption texts.

12. In contrast, the analysis under Article 81 EC has been considerably modernised in the past few years and now takes into account the definition and features of the market, the concentration on the market, barriers to entry, etc…In the same way, the aim of the rules applicable to undertakings (Articles 81 and 82 EC) has been better defined: access to the market, improvement of consumer welfare. Lastly, the concept of restriction of competition has become an independent element of the analysis.

13. However, with regard to State aids, Article 87(1) EC, is subject to a wide interpretation. Any selective advantage of State origin constitutes a State aid without conducting a real economic and competition analysis being conducted. Only the first three constituent elements – namely specificity, State resource, and gratuitous benefit – need to be fulfilled in order to be considered as State aid; while the conditions of an effect on trade between Member States and a distortion of competition are often assumed to be fulfilled without any real assessment. Furthermore ,despite numerous guidelines there is no method to distinguish State aid which raises difficulties and which need to be notified, from other measures.

14. As a result, while the EC Treaty provisions applying respectively to undertakings and to State aids are very similar, the Commission's approaches regarding these two fields are largely distinct and regarding State aids do not always seem to be guided by a coherent and comprehensible doctrine.

15. It results from the above a **great legal uncertainty for undertakings and Member States** that leads in particular to:

    (i) bundle of texts (frameworks, exemption regulations) which makes the understanding difficult;

    (ii) an obligation to notify in most cases, which involves long procedural delays;

    (iii) in the case of doubt as to the qualification of the measure and in the absence of notification , the likelihood that the measure may be held illegal by a national court;

    (iv) an important risk of reimbursement for small enterprises as for the largest ones, although they are not responsible for the notification and it is very often impossible for them to verify whether such a notification has occurred (in particular in the case of aid schemes).

In short, the worldwide situation is worrying and not satisfactory at the EU level for small undertakings as for the largest ones

2. THE COMMISSION'S ACTION PLAN

16. The Commission's Action Plan highlights the increasing complexity and number of documents adopted, that have "created a need to streamline State aid policy, focus attention on the most distortive types of aid and make State aid control more predictable and user-friendly, thereby minimising legal uncertainty and the administrative burden both for the Commission and for Member States" (§ 17)

AFEC fully agrees with the Commission's projects mentioned above.

17. The Commission proposes to carry out a "thorough modification of the existing State aid rules, as regards both substance and procedures" (§ 18) with the aim to presenting "a comprehensive and consistent reform package" based on the following elements:

(i) Less and better targeted State aids;

(ii) A refined economic approach;

(iii) More effective procedures, better enforcement, higher predictability and enhanced transparency;

(iv) A shared responsibility between the Commission and Member States.

18. AFEC's comments will be developed along the same lines.

2.1 "Less and better targeted State aids"

19. Whilst the Commission's Action plan has logically been inspired by this objective adopted earlier by the European Council, this leitmotiv seems to flow from a questionable a priori, which in turn may raise some concerns as to its consequences.

20. The a priori is that a causality link is presumed between the quantitative aspects ("less aids") and the qualitative ones ("better targeted"). But nothing justifies this presumption: as such, quantity is neither a guarantee of quality, nor an indication of poor quality of a given State aid policy.

In other words, the mere volume of State aids is and should remain a neutral element with respect to State aids' efficiency or inefficiency and it is regrettable that the Commission seems to establish a causal link between quantity and efficiency.

21. Turning to the consequences, there seems to be risk that the emphasis put on purely quantitative aspects could lead towards an excessively rigorous approach of State aids, so that only measures that would satisfy the "Lisbon criteria" could be considered compatible with the common market? Such approach would not only be questionable under the EC treaty but it might also jeopardize the competitive situation of European companies at worldwide level.

2.2 A refined economic approach

22. The Commission's intent to strengthen its economic approach is welcomed.

23. However, it seems to flow from the roadmap that such refined economic approach would only apply to aids that comply with the objectives of the "Lisbon strategy". One may thus wonder whether this refined economic approach should also apply to any type of aid.

2.2.1 Economic approach and competition analysis

24. The refined economic approach should primarily concern the competition analysis. This analysis should be carried out more systematically, notably but not only at the stage of Article 87(1) EC treaty, i.e. at the stage of qualification of an aid, which means, among others:

(i) a clear distinction between the criteria of "effect on trade" on the one hand, and "distortion of competition" on the other hand, which can neither be confused nor systematically be deduced one from another;

(ii) the recognition of the stand-alone nature of the criteria of distortion of competition vis-à-vis the three other criteria;

(iii) an analysis of the market and the competitive conditions, including an actual and pragmatic assessment of the international context.

25. Nowadays indeed, the Commission's practice shows a "distortion of competition" is almost systematically deduced from the existence of a selective advantage. This view is not always accurate notably because of significant disparities between legislation of Member States (in tax and labour matters, notably), between the market players, the structure of their costs, etc.

26. An enhanced competition analysis, based notably on (i) a prior definition of the market where the beneficiary is active, (ii) a clear identification of the beneficiary's actual competitors and (iii) the short and long term effect that this advantage can have on the beneficiary's costs and prices, would allow to better assess the actual effect that a given aid could have on the beneficiary's competitor by taking into account all consequences of the measure in question. Having regard to the specific aim of State aid policy, the approach towards market definition ought not to be exactly the same as in antitrust cases. Only those competitors who are in a situation genuinely comparable to that of the beneficiary should be taken into account when reviewing a possible distortion of competition.

27. It would therefore be suitable to appreciate the impact such an approach would have on the *effet utile* of Article 88, paragraph 3, EC.

2.2.2 State Aid Policy, Economic Analysis and Lisbon Strategy

28. Rightly, the Action Plan refers on several occasions to the Lisbon strategy, so that it seems to imply that the Commission's policy in State aid cases is expected to play a central role, if not 'the' central role in implementing the Lisbon strategy (cf. § 13 or 21 of the Action Plan).

29. AFEC welcomes the Commission's will to re-launch the Lisbon strategy, notably through a better utilisation of State aids. An increase in the Union's and the Member States' financial efforts towards research, innovation, infrastructure, etc. is indeed necessary.

30. However, Community State aid policy is broader than the mere perspectives opened by the Lisbon strategy and it is neither conceivable nor desirable that the 'refined' economic analysis hailed by the Commission only applies to such aids that are in line with the Lisbon strategy, as might be implied by the following Statement:

"To best contribute to the re-launched Lisbon Strategy for growth and jobs, the Commission will, when relevant, strengthen its economic approach to State aid analysis. An economic approach is an instrument to better focus and target certain State aid towards the objectives of the re-launched Lisbon Strategy." (Action Plan, § 21).

31. AFEC submits that such approach, if confirmed, would raise significant legal and practical concerns, to the extent that (i) the EC treaty obviously does not allow the Commission to condition the justification of a given measure of its 'compatibility' with the objectives laid down in the Lisbon strategy and (ii) there could not be a "double standard" in the assessment of any given aid, where the economic analysis would be reserved to the "Lisbon-type aids".

32. In short, whilst welcoming the Commission's intent to re-launching the Lisbon strategy and to using State aids as a tool in building this long-awaited embryo of European industrial policy, it would nevertheless be neither acceptable, nor desirable, to confine the whole State policy within the scope of the sole Lisbon strategy. Neither would it be acceptable to reserve the privilege of an in-depth economic analysis to those aids only, that are in line with the objectives laid down in the Lisbon strategy.

2.2.3 Economic analysis and market failure

33. The concept of market failure is one of the key elements brought into light by the Commission's Action Plan. The Commission seems to explain that it will henceforth take this concept into account as a criterion of assessment of any aid fulfilling the Lisbon conditions.

34. To some extent, this concept is not unknown in French law. However, neither the very substance, the scope nor the intended use of this concept is explicitly spelled out, which raises some questions.

The Definition of "Market Failure"

35. The concept of " market failure " is not explicitly defined in the Action Plan, but in a tautological way ("A 'market failure' is a situation where the market does not lead to an economically efficient outcome").

36. It seems nevertheless obvious that this notion cannot be confused with that of absolute deficiency because, absent any effect on intra-community trade or distortion of competition, the very qualification of aid itself would make little sense.

37. AFEC praises the emphasis put by the Commission on this concept, notably because it may pave the way to a doctrine allowing to better justify certain aids, but AFEC also submits that the definition of this concept needs to be further spelled out in more explicit and pragmatic terms than it currently is in the Action Plan.

The concept of market failure: at what stage of the analysis shall it be applied and what shall be its role?

38. If flows from the Action Plan that the concept of market failure will mostly be used at the stage of justifying a State aid, i.e. in applying Article 87(3) of the EC Treaty (see the insert on page 7, third paragraph before the end: "One important justification for State aid is therefore the existence of a market failure").

39. Nonetheless, one cannot rule out the possibility that in some cases, a market failure could be taken into account at the stage of qualifying an aid (Article 87(1)), with a view to set aside this qualification in cases where no market player is willing to invest in a 'failing' economic sector. Such cases where the concept of market failure seems to be equivalent to that of an absolute deficiency of private investors' initiative will probably not furnish the vast majority of market failure hypothesis (supra, § 36) but may nevertheless happen, and such possibility cannot be ruled out from the outset.

40. As was highlighted above, AFEC welcomes the emphasis put on the concept of market failure as one of the possible causes justifying a State aid, and would like to highlight that it would indeed be only one of several possible justifications.

41. In other words, in legal terms, the identification of a market failure can suffice to justify an aid, but could not constitute a necessary pre-requisite applying to all justifications.

2.2.4 Clarification of certain criteria

42. In addition to the comments above and whilst AFEC acknowledges that the following topic is not the primary subject matter of the Action Plan, AFEC submits that a clarification of some of the criteria used by the Commission at the stage of defining an aid would be necessary, within the context of a refined economic analysis.

Accordingly, guidelines on the concept of "market economy investor principle" or on the very vague concept of "nature and general economy of the system" would be greatly appreciated.

2.3 An increase in procedural efficiency, predictability, and transparency

2.3.1. The Commission's wish to improve judicial certainty, predictability of time periods and transparency

43. First of all, one can only adhere to the expressed will of the Commission to improve judicial certainty, transparency and predictability of time periods, as this objective ties in with the industry's major concerns relating to aids. To this end, the Commission is suggesting a number of amendments including the issuing of best practice guidelines (§50).

One can only approve the issue of such guidelines, which already exist in relation to merger control and have proved their worth. It is suggested to the Commission to go farther and to organize a series of "State of Play meetings", as has been done in merger control.

44. Nonetheless, it is worth emphasising that the issue **of time periods is a major industry concern**. If one can only approve of the Commission's desire to reduce delays through the issue of best practice guidelines, an amendment of the procedural regulation appears long overdue.

It has been requested in particular that, following the example of the regulations relating to merger control, in the absence of a decision from the Commission within the allocated time period, the aid be deemed authorised, and the Member State authorised to go ahead with the proposed measure without futher delay (amendment of Article 4, paragraph 6, of the regulations[1]). Some procedural delays, such as those following the opening of a formal examination, which are imperative and shorter, should moreover be mentioned in the procedural regulation, as the current regulations only allow for such time limits "within reason", this time limit being limited to 18 months! However, experience shows that, in certain cases, some decisions may take months, or even years, to reach. Business can not afford to await the Commission's decision for such long periods.

45. As regards the additional investigation powers requested by the Commission (§58, third dash), the Action Plan is unclear.

The Commission refers to "new instruments" allowing the enhancement of "the consultation of market participants and the gathering of relevant sectoral information through new instruments granting additional investigative powers."

If the aim is to allow for an economic and competitive analysis of said measures, such powers can only be approved.

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[1] *EC Regulation n°659/1999 dated 22nd March 1999 giving the terms of enforcement of Article 93 EC treaty.*

46. It also appears opportune to update the current rules applicable to on-site monitoring, in order to remove the requirement of prior approval by the relevant Member State and/or the limitation of the field in which such measures can intervene (positive or conditional decisions only). The use of on-site monitoring in particular would allow the Commission to collect the information required for a better application of its recovery decisions (cf. below 2.3.2).

On the other hand, powers of inspection as broad as those given to the Commission with regards to companies suspected of having infringed competition rules, are hardly justifiable in the context of State aids, and would in any case require more substantial procedural guarantees[2].

47. There is no mention in the Action Plan of the rights of beneficiaries and third parties during the procedure, whether in relation to new or existing aids, though these are of major concern to companies, beneficiaries and plaintiffs. In this respect, the experience of most operators is that there is a distinction in the procedural regulation, between "individual notifications" and "aid regimes notifications" procedures.

It is rather worrying that, in individualized procedures, the beneficiary company appears only indirectly in the procedure, though it is directly concerned by it: the requirement to refund illegal aids, to supply the Commission with most of the requisite information, and to offer the necessary guarantees, all weigh upon it. The current rule which requires that the control procedure for aid follow a diplomatic type procedure similar to that of the infringement proceeding, is completely artificial and at odds with reality.

48. A third major problem faced by industry is the lack of available information: it is, at the same time, difficult for companies (beneficiary or plaintiff) to know whether an aid or an aid regime was notified or if it falls into exemption regulations, difficult to ascertain the progress of a procedure or the information which the Commission has at its disposal, and difficult to be heard by the Commission during a procedure[3].

Once again, the importance of the distinction between aid regimes and individualized aid must be emphasised. The level of information of companies benefiting from aid regimes is very different to the level of information of companies benefiting from individualized aids. The Commission is aware of the situation since time and again, it refers to this lack of transparency. In this respect, the Commission's proposal to make information available on the Internet can only be approved. It should be made available on the Commission's website from the date of notification. This proposal remains nonetheless insufficient considering that the State aid procedure is brought by the Member States, but that the risk of recovery weighs on companies. Improvements are therefore imperative as part of the amendment of the procedural regulation.

The setting up of independent authorities might also remedy this opacity.

2.3.2. <u>The recovery of illegal aids</u>

49. The Action Plan suggests a number of improvements in order to solve the problems brought about by the application of Article 14, paragraph 3, of the procedural regulation, i.e. (i) a certain reluctance of Member States to recover illegal State aids and (ii) the dilatoriness of national procedures in the recovery of

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2 Cf. the comments formulated by the European Parliament when the same question had been considered as part of the reform of the merger control REGULATION (cf. resolution of 9 October 2003 on the report of Benedetto Della Vedova A5-0257/2003).

3 Furthermore, though it is understandable that the Commission cannot tackle the question in its Action Plan, the AFEC believes that a reflection on the subject of State aids and the impossibility for a company to intervene before the Court during a procedure between Member State / Commission, and on the articulation in the same affair of infringement proceedings before the Court and judicial review before the Tribunal.

illegal aids. Furthermore, the Action Plan suggests a procedural amendment in the recovery of aids by offering a systematic interim recovery of non notified aids (iii).

(i) *The reluctance of Member States to recover illegal State aids.*

50. Article 14, paragraph 3, of the procedural regulation, in combination with Article 14, paragraph 1, serves to ensure that the Member State concerned takes all necessary measures to recover illegal State aid, in accordance with the procedure set out by national law[4].

The fact that the Member State is the competent authority to recover the illegal aid though it is often the authority which previously granted it can be a source of difficulties. A reform appears necessary on this count.

The Action Plan, even if it does not suggest a complete overhaul of the current system, does however suggest methods by which to improve surveillance and means of action.

51. The Action Plan adds, in §51, that the Commission will notably examine if independent authorities might be able, in the Member States, to assist it in the application of rules concerning State aids (detection and provisional recovery of illegal aids, execution of recovery orders).

The idea of entrusting national surveillance authorities an intermediary role seems to make sense and would certainly attest to the existence of a real collaboration between the Commission and all the Member States.

It does however raise questions regarding the nature, the degree of independence and the role such authorities might have (see 2.4.1 infra). In this respect, AFEC suggests that only real and complete independence of these authorities would guarantee that they act in the interest of the Community and not in that of the Member State.

(ii) *The slowth of national procedures in the recovery of illegal State aids*

52. The Action Plan (§53) indicates that "the Commission will seek to achieve a more immediate and effective execution of recovery decisions, which will ensure equality of treatment of all beneficiaries. To this effect, the Commission will monitor more closely the execution of recovery decisions by Member States. Recovery has to be carried out in accordance with national procedures. But where it appears that recovery is not carried out in an immediate and effective manner, the Commission will more actively pursue non-compliance under Articles 88(2), 226 and 228 of the Treaty (…)".

53. Though the AFEC considers a more frequent use of the infringement procedure satisfactory, this proposal (and notably the vague character of its formulation) calls into question the existence of other resolutions not mentioned in the Action Plan.

54. The AFEC notes firstly that the imprecision of Commission decisions, concerning, for instance, the identity of the company required to pay back the aid, or the definite amount to be reimbursed, sometimes constitutes an additional obstacle to the execution of decisions of aid recovery[5]. If this vagueness can sometimes be explained by the nature of the aid or by the lack of information given by the relevant Member State during the procedure, it is important to ensure that the

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[4] unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary. The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law."

[5] *Though the Commission does not recall this problem in its Action Plan, it is mentioned in an article of the recent Competition Policy Newsletter n°2-Summer 2005 Nuria, Marinas, Enforcement of State aid recovery decisions, p. 19, supra.*

terms of enforcement of the decision contain all necessary elements for an efficient execution of recovery[6].

55. AFEC also especially wishes to emphasise that the Commission is currently examining the need to impose strict delays in the execution of its decisions to recover illegal aids[7], in order to regulate the Member States' room for manoeuvre. AFEC considers this idea - which tends towards a real "requirement of result" for the Member States - promising. Indeed, it would circumvent the problem of a harmoniszation of national legislations concerning the execution of Commission decisions relating to the recovery of illegal aids.

56. Moreover, when the Commission returns negative decisions which are subject to judicial review before Community jurisdictions, AFEC believes that the national judge should make a more systematic use of immediate suspension measures and/or interim recovery of national acts which contradict Article 88, paragraph 3, EC, by seeking inspiration from the principles laid out in Community case law relating to validity checks of national acts of execution of Community regulation[8].

(iii) *As regards the systematic interim recovery of non notified aids*

57. The Commission requests an extension of the scope of the recovery injunction and the setting up of a systematic interim recovery of non notified aids (§58).

This proposal brings up a number of questions.

58. This interim recovery procedure is set out in Article 11, paragraph 2, of the procedural regulation, but is subject to such strict conditions (emergency, detriment, absence of doubt on the qualification) that it has never been used. Does the Commission Plan to make a more systematic use of this provision or as soon as the aid is not notified, even if the conditions above are not met? Does the Commission intend to suggest an amendment to the regulations on this point?

59. Such a procedure, whatever its terms, does not satisfy the Commission's concern that aid measures be notified. This requirement of notification is upon Member States, while the obligation to reimburse weighs on undertakings. In aid regimes however, (i.e. in contrast with individual aids), companies have virtually no awareness as to the existence or not of any notification.

Generally speaking, Member States are not much concerned by the risk incurred in the absence of notification, since the obligation of refund is upon companies, the State the State limiting its action to the recovery of the aid which it illegally paid out itself.

60. Other mechanisms must undoubtedly be set up to avoid further instances of absence of notification.

In accordance with this idea are:

- the Commission's Plan to adopt general exemption regulations;
- the Plan to increase the threshold of "de minimis" aids.

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6 *In the same way, the recent precision brought by EC regulations n°784 / 2004 of21 April, 2004 (OJEC n ° L 140 of 30 April 2004 p. 1) at Article 14, paragraph 2, of EC regulations n°659 / 1999 related to the calculation of the interest rate applicable to the recovery of illegal aids.*

7 *Competition Policy Newsletter n°2-Summer 2005, Nuria Marinas, Enforcement of State aid recovery decision, p. 20, supra.*

8 *ECJ joint cases C-143/88 et C-92/89 [21 February 1991], Zuckerfabrik Süderdithmarschen et Zuckerfabrik Soest c. Hauptzollant Itzehoe et Hauptzollant Paderborn, Rec. 1991, p. I-415 ; ECJ C-465/93 [9 November 1995], Atlanta Fruchthandelsgesellschaft mbH et autres c. Bundesamt für Ernährung und Forstwirtschaft, Rec. 1995, p. I-3799.*

61. The creation of independent national authorities with the power to request information from the Member States might also constitute an interesting solution to the problems posed by the absence of notification.

62. The increased challenging of State liability, the recovery of aids which are then paid in to the budget of Community budget and not to that of the Member States, as well as the more frequent resort to infringement proceedings are certainly more satisfactory answers.

Once again, for the resolution of these difficulties, the differentiation between aid regimes and individual aids ought to be more clearly set out.

2.4 **Better governance, a responsibility shared with Member States**

2.4.1. The assistance of independent national authorities

63. The Commission proposes to be assisted by independent authorities in the enforcement of State aid rules. This assistance would intervene for detection and interim recovery of illegal aids and the execution of recovery decisions (§51).

It also considers the establishment of a network of State aid authorities or contact points in order to facilitate the flow of information and exchange of best practices (§53).

64. This proposal is considered very interesting by AFEC, with the proviso of knowing the attribution of such authorities.

Certain authorities already exist in a number of Member States (Finland, Greece, Ireland, Denmark, Netherlands, and in the new Member States). A national Commission of public aids was created in France in 2002, but was not maintained[9]. AFEC reminds the reader that in France, the Supreme Court of State (Conseil d'Etat) verifies the governmental regulation with Community rules on State aids, and issues an unfavourable decision when it is presented with bills which are not notified.

65. AFEC is not favourable to the creation of a new authority, but rather believes that the recourse to an existing authority would be preferable, as long as it enjoys certain powers and effective independence. AFEC also recommends, in order to avoid disparities between States, that common principles which define both the role and the powers of these authorities, be fixed at Community level.

66. According to AFEC, these national authorities might solve quite a few difficulties encountered by operators in relation to State aids, notably the problems of information. Without giving them the power to verify the compatibility of these aids, these authorities could:

- keep databases;
- be granted the right to question Member States about aids allocated, their regularity, and the exemption regulations which they possibly benefit from;
- have a power to alert (/inform) the Commission;
- generally, answer requests for information received from the operators;
- answer other national authorities which are part of the Network;
- assist State, regional and local authorities;

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[9] Cf. Law n°2001-7 of January 4th, 2001 relating to the control of public funds allocated to companies: the Commission Nationale des Aides Publiques aux Entreprises (CNAPE) (National Commission of Public Aids to Enterprise).

- undertake a "calibration" of performances.

2.4.2. The role of the national judge

67. The Commission feels that the national judge should play an ever more important role, on the basis of Article 88, paragraph 3, EC (§55 of the Action Plan).

68. This power granted to the national judge and acknowledged by the case law is not, however, enshrined explicitly by any texts, and is most notably absent in the procedural regulation. Even if this principle has been second nature for more than 40 years thanks to the volume of case law on the subject, a consecration in the texts would not go amiss (Article 6 of regulation 1/2003 reiterates what is known and applied since the Bosch case of 1962). Such clarification might also intervene through a redrafting and better circulation of the Commission's "Notice on cooperation between national courts and the Commission in the State aid field" (OJ n° C 312 of 23 November, 1995).

69. In this respect, it is necessary to emphasise that the effectiveness of the role of the French judge is weakened by the average duration of a procedure, and is lengthier still in the case of a preliminary ruling procedure relating to State aids. Indeed, the effectiveness of the national judge is called into question, when the detriment resulting from the handout of an illegal aid is only put right several years after the beginning of the execution of the sentence. It therefore appears necessary to reinforce the national judge's power to suspend the handout of a State aid, as part of a urgency procedure, possibly matched by a preliminary ruling procedure on the aid, when doubt persists as to the legality of this aid with regard to Article 88, paragraph 3, EC. To this end, just like the precontractual summary judgement instituted in accordance with a Community directive in the field of public works contracts, the Commission might consider taking the initiative by suggesting a community instrument which would impose the institution of an appeal procedure under national law allowing the suspension of the execution of State aids when there is a doubt on the legality of the aid.

70. Furthermore, the Commission has added that it has undertaken a study concerning in particular the role of national jurisdictions in the application at national level of negative decisions, especially those matched by an obligation of recovery.

Such a study demonstrates the will of the Commission to clarify the role of the national judge in the application of its decisions to recover illegal State aids.

In this respect, a full and whole application of the principle of primacy would give the judge more support in the application of Community law with a view to setting aside the legal obstacles raised at national level (which are often contrary to principles established by Community case law).

A new set of guidelines (Best Practices) might emphasise the extent of the principle of primacy of Community law, and the limited relevance, in most cases, of certain arguments used to counter a request for restitution of the illegal aid, while encouraging the national judges to use the means at their disposal.

71. On this point, AFEC would however like to draw the attention of the Commission to the new trend taking shape within the Court of justice's case law, tending to make it ever more difficult for taxpayers to demand the refund of sums allocated to the payment of non notified aids. The previous case law constituted a real threat for national authorities, as they were directly threatened by decisions of tax relief. If the Court persists in its demand that all payments in question be directly matched to a non notified aid in order to obtain a refund[10], a powerful instrument of dissuasion will disappear. Without wanting to undermine the independence of the European judge, it seems opportune that its attention is drawn to this issue.

[10] See in particular judgments of 13 January 2005 in cases C-174/02 (…) and C-175/02 (…)

72. The Commission is furthermore proposing to specify the role and the use of exemptions by category and guidelines (§59).

AFEC can only subscribe to such a proposal.

3. A GENERAL BLOCK EXEMPTION REGULATION

73. AFEC agrees with the Commission's proposals to adopt a general block exemption regulation and considers that the possibility of giving the exemption a negative effect should be examined. This suggestion will most likely improve and simplify the procedure. However on which legal basis does the Commission plan to give jurisdiction to the national judge to declare State aids as being incompatible?

74. Pursuant to the Action Plan, the block exemption regulation should "simplify and consolidate the existing block exemptions (training, SMEs and employment)" and also "integrate a broader range of exemptions, notably as regards aid to support SMEs and R&D". The Commission will also consider "integrating certain categories of aid, such as regional and environmental State aid as well as and rescue aid for SMEs…" (see § 36 and 37). In addition, the de minimis threshold for State aids will be increased (see § 38).

75. Such a regulation is welcome for a number of reasons. State aid which does not currently benefit from a block exemption, such as aid for R&D, environment and risk capital, could thus be granted without having to wait for Commission clearance and without being subjected to a case by case examination, which is inappropriate for such general objectives.

Furthermore, the submission of block exemptions regarding such matters, to the existing regime for training, employment and SMEs, would result in avoiding difficulties of qualification for measures which can be tied up with several objectives (for example environmental research or training for those in search of employment).

Such regulation represents a timely opportunity to confirm the evolution in control toward a more refined economic and less formalist approach. The situation which justified the adoption of regulation 2790/1999 on vertical agreements on 22 February 1999 is not dissimilar from that which now justifies a new regulation (the ambivalent nature of State aid and the need to take better account of the economic aspect, expiration of the existing block exemption regulations, obstruction of the Commission, etc...). There are some notable differences however: acquired experience is undoubtedly not as important (control has mainly developed since 1993), the field is often related to public State intervention (in fact, such an exemption regulation can only be beneficial).

76. The content of the general block exemption regulation should be carefully considered.

It seems at first that its scope must be as wide as possible and should probably cover all horizontal aid relevant to guidelines or frameworks, even if particularities of each type of aid should be preserved. Their insertion would be welcome in particular when the texts are complex and/or obsolete as this would allow for clarification and adaptation of their content according to acquired experience. For example, the framework for R&D aid is so complicated that it is difficult to predict with a reasonable degree of certainty whether a particular instance of aid is likely to be authorised or not by the Commission[11]. A block exemption would clarify which R&D measures could actually be covered. Likewise, environmental aid has recently seen much development, for example, in the markets for emission rights and renewable energy - priority objectives which suffer at the hands of delays caused

[11] In particular due to the fact that it is difficult to determine how far apart from the market the favored practice is.

by preliminary controls. The regulation could encompass such new practices, so that they could be implemented faster.

77. Conversely, taking into account its direct effect, the regulation should remind us that certain measures do not constitute aid, either because they are general in character and available to all companies or because they benefit the whole population and do not constitute an advantage for specific companies or sectors as is the case for scholarships and initial training (see recital 6 of the regulation on training aid).

78. The regulation should also point out that public service compensation which meets the criteria set out in the Altmark case does not constitute aid. It should make clear that the Commission's decision of 13 July 2005, regarding aid in the form of public service compensation exempts them from notification. The regulation should also provide indications on the division of measures falling under its scope on the one hand, and those falling under the scope of this decision or of the framework for State aid in the form of public service compensation on the other. Such indications seem all the more necessary as the framework implementation raises significant problems which should be partially resolved by the block exemption.

79. The criteria for the block exemption should also be as precise and objective as possible, in particular by taking into account the direct effect of such a regulation and the risk of diverging interpretations. Consequently, they should not be defined either too tightly or in too formal a way. To do otherwise may result in stripping the regulation of a part of its object. Furthermore, the exemptions should not impose an economic assessment which is too complex and harm their predictability.

Indeed, it may be pointed out that the parties concerned are ever less frequently central administrations or large companies which hold a certain competence to assess whether an aid would meet the criteria. Horizontal aids, regarding employment, training or the environment are now increasingly granted by territorial communities to SMEs, neither of which have the necessary technical means to make sophisticated economical assessments, particularly as regards defining the market and analysing market shares.

80. Other points will have to be considered and only some of them are known at this stage:

- Would the general block exemption regulation be adopted on the basis of the Enabling Regulation n°994/98 of 7 May 1998?

- Will the exemption be accompanied by an interpretative document?