

15 September 2005

## **STATE AID ACTION PLAN**

### **LESS AND BETTER TARGETED STATE AID: A ROADMAP FOR STATE AID REFORM 2005 – 2009**

#### **1. INTRODUCTION**

The Commission proposes a comprehensive reform of state aid policy over the next five years. In particular, the Commission intends to use the state aid rules to encourage Member States to contribute to the Lisbon Strategy by focusing on commonly agreed, politically desirable objectives. In addition, the Commission wants to rationalise and streamline procedures, so that the rules are clearer and attention is focused on more distortive types of aid.

More concretely, the Commission aims to facilitate approval of state aid measures that are unlikely to produce major distortions of competition and which contribute directly to the achievement of Community objectives, such as promotion of research and development and innovation, protection of the environment, creation of new and better employment, and regional development. This should allow Member States greater flexibility to design and implement aid measures which are adapted to local conditions and enable the Commission to transfer resources from the assessment of relatively minor cases towards more important cases which may produce major distortions of competition.

UNICE endorses the principle that Member States should redirect aid towards horizontal objectives of common interest and target it to identified market failures, whilst reducing the overall level of state aid, as expressed by the European Council in Stockholm and Barcelona. UNICE also recognises the need for new rules for assessing state aid measures that are unlikely to cause major distortions of competition, which would enable the Commission to focus on important cases. However, it is essential that the proposed solutions will not harm transparent and effective state aid control in the common market. The current lack of effective Community control on the implementation by the Member States of block exemption regulations in the field of state aid is already a matter of concern to UNICE.

UNICE is very pleased with the Commission highlighting certain shortcomings in the practices and procedures of state aid policy and it commends the Commission for addressing this issue in its Action Plan.

The Action Plan explicitly mentions the necessity of increasing transparency in state aid policy in order to allow companies and other interested parties to get involved in state aid policies. UNICE believes that companies can play an important role in this respect and welcomes taking part in discussions on how best to shape future policy and improve the present system. Its views and recommendations are set out below. Considering that the Action Plan primarily sets out what the guiding principles are for reforming the different sets of state aid rules, UNICE's views are preliminary. It will give its final views about the proposed changes when more concrete proposals are decided.

## **2. A MODERNISED STATE AID POLICY IN THE CONTEXT OF THE LISBON STRATEGY FOR GROWTH AND JOBS**

UNICE shares the Commission's views on the need for a modernised state aid policy.

UNICE has consistently held that strict control of state aid, on the basis of clearly defined criteria, is necessary to prevent distortions of competition in the internal market and has repeatedly called on the Commission to define these criteria through guidelines and block exemption regulations, while at the same time urging the Commission to ensure that any new rules do not undermine the efficiency of state aid controls and maintain a level playing field.

UNICE therefore supports the Member States redirecting aid towards horizontal objectives of common interest and targeting it to identified market failures, whilst reducing the overall level of state aid. It is important that state aid is targeted to situations where the market is not itself sufficiently able to achieve desired objectives of common interest. Interventions in the market through state aid in situations where there are no clear market failures increase the risk of distorting the proper functioning of that market, leading to a situation where uncompetitive companies are assisted at the expense of more competitive companies, which in the longer term will harm European competitiveness.

In this context, UNICE endorses the principle of the Commission using economic and legal analyses to determine whether a measure is state aid and whether state aid can be declared compatible with the Treaty because the positive impact of the aid measure in terms of achieving more growth and jobs outbalances the potentially negative side effects. It is important, as the Commission correctly points out, that the Member States provide the necessary evidence in this respect. UNICE especially welcomes the intention of the Commission to strengthen its economic approach to state aid analysis with one key element being the analysis of market failures. In that respect, UNICE wants to stress the importance of this analysis being done properly and in a fully transparent way in order to avoid misunderstandings regarding the allocation of state aid.

UNICE would like to express two general concerns.

First of all, decentralisation of state aid control, which relies heavily on self-assessment and monitoring by the Member States and companies themselves (the primary responsibility for the correct implementation of the block exemption regulations lies with the public authorities rather than the companies), should not detract from the uniform application of EC state aid law. A further reflection will be necessary on the appropriate tools to ensure better transparency, monitoring and control of any decentralised system of state aid management.

Secondly, UNICE insists that the economic approach should not increase legal uncertainty or administrative burdens in the approval of state aid schemes. Economic analyses in this context should be clear, transparent and consistent, and based on effective and commonly agreed criteria. Further indication may be useful regarding the way the Commission intends to apply the economic approach in practice.

### 3. FOCUSING ON THE KEY PRIORITIES

#### *Targeting innovation and R&D to strengthen the knowledge society*

Investment in R&D is essential for economic development in the EU and the Community framework for state aid for R&D is therefore of great importance to improving European competitiveness, as emphasised in the Lisbon Strategy and Barcelona Objective. R&D is widely considered as a general case where market failures (e.g. positive externalities) apply and a role for government intervention exists.

In this context, UNICE would like to remind that the Commission some two years ago already announced that a review of the state aid rules for R&D would be a priority. This is why UNICE put forward detailed suggestions for such a review in a paper dated 14 September 2004. As a general point, UNICE refers to its position that current rules on state aid for R&D are often complex and unclear, resulting in Member States adopting different interpretations, legal uncertainty for companies and procedural delays. The definition of permissible R&D aid is too narrow hampering the effectiveness of Member States' measures to encourage R&D. In order to determine the proximity to the market of aided R&D, the Commission currently makes a distinction between fundamental research, industrial research and precompetitive development activity. In UNICE's view, the distinction between industrial research and precompetitive development activity should be abolished and a single category "industrial RTD" be created. The current framework for assessing R&D projects on the basis of the separate sequential R&D stages from the outdated linear innovation model is incompatible with strict time-to-market requirements and should be updated to reflect today's concurrent, iterative and interactive industrial innovation process with constant market feedback. UNICE thus supports the Commission's suggestion to base the review of the framework on an approach better reflecting an interactive industrial innovation process which can also take account of continuous feedback from the market.

UNICE also supports the Commission's suggestion that the framework should also take account of the growing importance of public private partnerships in the R&D field. There should be a clear distinction between the roles of universities and public institutes as vehicles of indirect aid to industry and as recipients of direct aid; and there should be a clear distinction between collaborative research and contract research. In the case of collaborative research, the same IPR provisions as in the EU Sixth RTD Framework Programme should apply so that no compensation would have to be paid for access and use of IPR where the Framework Programme rules allow them royalty-free. In the case of contract research where part of the costs is publicly financed, due account should be taken of industry's contributions in the form of financial and non-financial ("in-kind") support or pre-existing know-how when determining the fair compensation for the resulting IPR.

In UNICE's view the thresholds for notification of individual projects under an approved R&D scheme should be increased so as to allow the Commission to focus on assessing large individual projects.

UNICE also urges the Commission to ensure that European companies are not suffering from a competitive disadvantage vis-à-vis their competitors located outside the EU who are not (or less) affected by R&D subsidies control. The Commission should seek to establish a global

level playing field for R&D subsidies through the WTO departing from improved Community state aid rules.

### *Creating a better business climate and stimulating entrepreneurship*

UNICE supports the Commission's suggestions to improve the business climate, notably by reducing the total administrative burden, simplifying and improving the quality of legislation, facilitating the rapid start-up of new enterprises, and creating an environment more supportive to business. Similarly, UNICE supports a revised Communication on risk capital contributing to a culture of entrepreneurship and further stimulating investment in the form of risk capital in particular in favour of start-ups and young, innovative SMEs, where this can properly address identified market failures.

### *Investing in Human Capital*

UNICE agrees that state aid could be justified when it is necessary to provide the right incentives for employers to engage more workers, particularly those who have difficulties to access and remain on the labour market, and to provide appropriate training for workers.

### *Better prioritization through simplification and consolidation*

UNICE would favour simplification and consolidation of the existing state aid rules and could support the creation of a general block exemption regulation which would comprise the existing exemption regulations. However, decentralisation of state aid control by means of block exemption regulations, which will require Member States to police their own activities, clearly amplifies the risk of legal uncertainty and differing interpretations emerging across the EU, especially if they are broad and leave a margin of discretion. It is therefore important that the regulations are clear, that all relevant information is accessible about block-exempted aid schemes, and that the Commission carefully monitors their implementation.

As regards the increase of the threshold under which Member States may grant *de minimis* aid, it would be useful to know whether the Commission has completely abandoned the so-called LASA proposal concerning aid of a lesser amount. In such a case, UNICE would, in principle, endorse the increase in the *de minimis* threshold.

However, the Commission should bear in mind that there is currently no mechanism to check whether different Member States grant *de minimis* aid to the same company which happens to be operating in these different Member States, thereby significantly increasing the total amount of aid the company in question is getting. Nor do the national registers for *de minimis* aid seem to be working at all or effectively. The same applies to the block exemption regulations. The current amount of state aid granted under the existing block exemption regulations is estimated to represent already more than a quarter of all annual state aid granted in the EU. Therefore, UNICE would insist that the Commission ensures that the appropriate tools are put in place to guarantee that the entire mechanism is made more transparent and that all abuse is avoided.

#### **4. MODERNISING THE PRACTICES AND PROCEDURES OF STATE AID**

UNICE certainly agrees with the Commission that there are currently shortcomings in the practices and procedures of state aid policy and it welcomes the Commission addressing this issue in its Action Plan. In the past, UNICE has on several occasions identified a number of problems related to the enforcement of Commission decisions, the use of national courts, delays in the substantive assessment of state aid measures by the Commission, and the lack of transparency. Enforcement of Commission decisions, especially regarding recovery of illegal and incompatible aid, is still problematic, in spite of increased Commission focus on this. Restricted investigatory and legal Commission powers and delays through national litigation in case negative and conditional Commission decisions are challenged by beneficiaries, significantly hinder enforcement of Commission decisions, thereby completely negating the effectiveness of EU state aid disciplines in removing injury to unaided competitors. There are genuine difficulties in bringing (cross-border) cases before national courts and to use them as enforcers of state aid rules. Third parties often lack the incentive to bring a case of illegal aid before the national courts as the costs of litigation may exceed possible benefits. Third parties often lack investigatory powers and may therefore be unable to establish that illegal aid was granted. National courts are not always sufficiently familiar with EC state aid rules to deal adequately with questions of illegal aid, and foreign competitors may lack knowledge of the relevant legal system, while national competitors may have inhibitions to start a legal action against their own government.

UNICE greatly welcomes Commission suggestions to improve its internal practice and administration and increase efficiency, enforcement and monitoring. More predictable and shorter timelines, clear intermediary steps in the procedure, the introduction of deterrence mechanisms to encourage Member States to duly and correctly notify, and higher transparency by providing more information on the Internet are welcome steps towards improving state aid control and strengthening third party involvement. UNICE also supports the Commission more closely monitoring the execution of recovery and conditional decisions and pursue more actively non-compliance. Although less optimistic about the good-working of a network of state aid authorities, UNICE believes that independent authorities could play a role as regards facilitating the task of the Commission in relation to detection and provisional recovery of illegal aid and execution of recovery decisions. It is essential that these authorities also get an independent role in the substantive assessment of issues delegated to Member States by the block exemption regulations. This would help establish the necessary division of power between the twin roles of Member States as both policemen and donors as described above.

As regards the suggestions to encourage stakeholders to ensure that the rules of state aid are fully respected through use of private litigation before national courts, UNICE fears that more is needed. National court proceedings in relation to state aid should be improved and harmonised within the EU to increase efficiency of national courts. UNICE has in the past urged the need for a remedies directive which could harmonise the rights of parties, the nature of the remedies available, and procedural and other rules. Amongst other things, the ability to obtain speedy injunctive relief is of particular importance.

**REVIEW OF THE COMMUNITY FRAMEWORK FOR  
STATE AID FOR RESEARCH AND DEVELOPMENT****UNICE COMMENTS****1. INTRODUCTION**

Before the end of 2005, the Commission is scheduled to review the Community framework for state aid for research and development (R&D) that has been in force since 1996. In reply to a wide consultation initiated by the Commission prior to deciding on the framework's renewal in 2002, UNICE in 2001 put forward its views as regards issues to be taken into consideration in modernising the framework. As a contribution to the debate on the 2005 review, UNICE now wishes to present an updated and extended version of its submission in the 2001 consultation.

In view of the Union's Lisbon strategy of becoming the world's most competitive and dynamic knowledge-based economy by 2010 and particularly the Barcelona objective of increasing R&D expenditure to approach 3 % of GDP by 2010, of which 2/3 should be funded by the private sector, boosting investment in business R&D is one of the Union's key challenges if it wants to catch up with its global competitors. As pointed out in the Commission's Communication "Investing in research: an action plan for Europe" (COM(2003)226), reviewing the Community framework for state aid for R&D is therefore of great importance, as it sets the boundary conditions for Member States in stimulating private R&D.

As a general point, UNICE notes that current rules on state aid for R&D are often complex and unclear, resulting in Member States adopting different interpretations, legal uncertainty for companies and procedural delays. Also, when assessing R&D aid, the Commission's definition of permissible R&D aid is often too narrow. This hampers the effectiveness of Member States' measures to encourage R&D. The Commission should therefore improve and simplify current rules.

In addition, the Commission should ensure that European companies are not suffering from a competitive disadvantage vis-à-vis their competitors located outside the EU who are not (or less) affected by R&D subsidies control. The Commission should seek to establish a global level playing field for R&D subsidies through the WTO.

In the context of establishing the European Research Area, UNICE also encourages the Commission to grant more often derogation for important projects of common European interest (Article 87 (3) (b) of the Treaty) for transnational R&D projects in the context of European Technology Platforms, intergovernmental programmes or of national programmes fully open to participation from other Member States. Preferably, such derogations should be granted at the level of such programmes or schemes, rather than at the level of individual projects therein.



UNICE will elaborate further on these and other issues below.

## 2. THE FRAMEWORK

### ***Fundamental research, industrial research and precompetitive development activity***

In order to determine the proximity to the market of aided R&D, the Commission currently makes a distinction between fundamental research, industrial research and precompetitive development activity. Fundamental research and industrial research may qualify for higher levels of aid than precompetitive development activities, which are closer to the market.

In practice, however, this distinction between separate, sequential R&D stages in industry has become obsolete, as boundaries are blurred: precompetitive development activity (defined in the framework as the shaping of the results of industrial research into a plan or design for new products) and the industrial research itself are usually carried out concurrently, with close interaction between knowledge creation and application. At present, markets are increasingly global, dynamic and competitive; speed is therefore essential for obtaining new products, processes and services and for introducing these rapidly and successfully to the market.

The current framework for assessing R&D projects on the basis of the separate, sequential R&D stages from the outdated linear innovation model is incompatible with strict time-to-market requirements and should therefore be updated to reflect today's concurrent, iterative and interactive industrial innovation processes with constant market feedback. In UNICE's view the Commission should therefore abolish the distinction between industrial research and precompetitive development activity and create a single category "industrial Research and Technological Development (RTD)".

As a general rule, the gross aid intensity for all "industrial RTD" should not exceed 50% of the eligible costs of the project. The new category "industrial RTD" should also include prototypes (as long as the primary objective is to make further improvements) and computer software (if its completion depends on the development of a scientific and/or technical advance and its aim is the resolution of a scientific and/or technological uncertainty on a systematic basis). Routine or periodic changes made to products, processes and services, on the other hand, should be excluded. This would also be in line with the broader definitions of R&D as provided in the Commission Regulation on the application of Article 81 (3) EC to categories of research and development agreements, and the OECD guidelines for the classification of scientific and technological activities (Frascati Manual). UNICE suggest that the Commission investigates whether these broader definitions could be used for distinguishing industrial RTD and closely related innovation-oriented activities qualifying for R&D aid from business activities disqualifying for such aid.

### ***Incentive effect of R&D aid***

Current rules on state aid for R&D stipulate that aid for R&D has a clear incentive effect and leads to R&D activities in addition to a firm's normal day-to-day operations.

UNICE considers that the Commission's interpretation of this requirement should not put European companies at a competitive disadvantage vis-à-vis their competitors located outside the EU, who are not suffering from comparable constraints. In practice, it is very difficult to prove that certain R&D activities are carried out in addition to normal day-to-day operations. In any case, the Commission should not *a priori* disqualify aid for R&D projects that fall within a firm's core business or which have clear market potential.

### ***Public-private partnerships***

To address the “European Paradox”, which refers to Europe’s notoriously poor track record in translating the results from its strong public research base into successful innovative products and services in the market place, the links between industry and public research need to be strengthened, for example by means of public-private R&D partnerships. Unfortunately, the framework’s provisions for “R&D carried out by public non-profit making higher education or research establishments on behalf of or in collaboration with industry” (section 2.4) are insufficiently attractive to industry. They are ambiguous and imprecise, and therefore prone to interpretation problems, particularly regarding IPR issues.

For example, one of the alternative situations of permitted state aid is “where the public non-profit-making establishment receives from the industrial participants compensation equivalent to the market price for the intellectual property rights which result from the research project and which are held by those industrial participants, and where the results which do not give rise to intellectual property rights may be widely disseminated to interested third parties”. In this case, it is not clear whether and how such compensation would take account of the contributions that the industrial participants may make to the project by means of their own R&D activities, financial payments, non-financial (‘in-kind’) support or pre-existing know-how.

To stimulate public-private partnerships in R&D and clarify the relevant section in the framework, UNICE submits the following recommendations:

- Make a clear distinction between the roles of universities and public institutes as vehicles of indirect aid to industry and as recipients of direct aid.
- Make a clear distinction between collaborative research (i.e. universities or public institutes working *with* industry as their partner, e.g. in an R&D aid scheme) and contract research (i.e. universities or public institutes working *for* industry as their principal);
- In the case of collaborative research, apply the same IPR provisions as in the EU Sixth RTD Framework Programme, so that no compensation would have to be paid for access and use of IPR (pre-existing know-how and knowledge resulting from the project) where the FP rules allow them royalty-free, unless otherwise agreed before the collaboration contract is signed.
- In the case of contract research, State aid in the meaning of Article 92(1) of the EU Treaty is not involved where industry bears the full cost of the project. In case part of the cost is publicly financed, due account should be taken of industry’s contributions to the project in the form of financial payments, non-financial (‘in-kind’) support or pre-existing know-how when determining the fair compensation to be paid to the university or public institute for the resulting IPR.

To illustrate the above, UNICE is willing to provide the Commission with examples of public-private R&D partnerships with appropriate IPR arrangements.

### 3. OPTIONS FOR A FUTURE TEXT CONCERNING STATE AID FOR R&D

The Commission has the option either to adopt a block exemption regulation for R&D aid or to adopt revised rules. UNICE has consistently held that strict control of state aid, on the basis of clearly defined criteria, is necessary to prevent distortions of competition in the internal market and has repeatedly called on the Commission to define these criteria



through guidelines and block exemption regulations, while at the same time urging the Commission to ensure that any new specific block exemption regulations do not undermine the efficiency of state aid controls. Decentralisation of state aid control by means of block exemption regulations, which rely heavily on self-assessment and monitoring by the Member States themselves, should not detract from the uniform application of Community law.

Decentralisation clearly amplifies the risk of inconsistencies within the system. Consequently, and considering the complexity of R&D aid schemes, UNICE believes that the Member States should continue being compelled to notify their R&D aid measures to the Commission. However, the thresholds for notification to the Commission of individual projects under an approved R&D scheme should be increased, so as to allow the Commission to focus on assessing large individual projects.

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