



POSITION ADOPTED BY MEDEF CONCERNING THE EUROPEAN COMMISSION'S STATE AID ACTION PLAN

MEDEF supports the process initiated by the European Commission through the publication of the Commission's action plan aimed at reforming the whole of the State Aid scheme. MEDEF would very much like to actively participate in this reform process, which is in line with positions already taken by MEDEF in the area of State aid in the form of public service compensation¹.

Along these lines, MEDEF submits below, to the European Commission, its observations on the proposed action plan for the modernisation of State Aid control, taking into account in particular the global context in which French enterprises are trading.



¹ "State aid in the form of public service compensation – First observations submitted by MEDEF": Position of 19 April 2004

MEDEF acknowledges that State aid granted to enterprises may help structure the economy at a local, national and European level. However, MEDEF emphasises the need to ensure effective control of State aid because of its potentially adverse impact on competition.

In this context, MEDEF shares the European Commission's objective, which is to rationalise the State aid policy in accordance with the "spend less, spend better" principle.

State aid control has not evolved in the same manner as the rules governing anti-competitive practices, in terms of modernisation of implementation practices and procedures.

However, while MEDEF admits that certain types of aid are justified, MEDEF remains committed to strict compliance with the Treaty's objectives in terms of State aid. Indeed, the prohibition laid down as a matter of principle by Article 87§1 of the treaty must be maintained, including in new Member States, in keeping with the rule of free competition among enterprises of the European Union. As regards the exceptions (which are also provided for in the Treaty), they must form part of a legal framework that is as secure as possible, especially because challenging the aid may have consequences for the enterprise concerned, but also for its various commercial and financial partners.

It is necessary to set forth that the public sector compensation paid to enterprises responsible for managing services of general economic interest, after a call for tenders and pursuant to a contract containing the indications listed under Article 4 of the state aid decision, must of right be deemed compatible with Article 87 of the Treaty and must be exempt from the prior notification requirement laid down under Article 88 paragraph 3 of the Treaty, regardless of the amount of the compensation.

MEDEF recommends that this reform pursues the following objectives:

1.- NEED TO TAKE INTO ACCOUNT PRACTICES PREVAILING IN OTHER ECONOMIC AREAS

In the European Union, State aid covers a broad segment of the economy and acts as a lever favouring the economic stability of the area concerned, in particular in order to help the area catch up in structural terms.

The enlargement of the European Union increasingly favours exchanges in a globalised economic environment where the customer base of enterprises is not only local but also global.

This is why the action plan proposed by the European Commission must factor in competition between enterprises located on the territory of the European Union and enterprises located in other economic areas, as well as the effects of reciprocal interactions among these two groups of enterprises:

- structural effects, when international investors create value in order to set up operations on the European market; and
- opportunistic effects when investors capitalise on the greater flexibility of their domestic market as regards State aid regulations in order to capture market shares to the detriment of European enterprises.

The European Commission should give, in its approach, greater importance to the effects of state aid on competition among the various regional economic areas (China, Americas, India), within the international legal framework defined by the WTO.

It is necessary to recall that the anti-subsidy agreement currently in force is binding only on the Member States of the WTO, that this agreement only provides for ex post facto remedies and does not apply to goods. It is essential that the analysis conducted by the Commission also includes, on the basis of comparative research, the practices of the various States.

In addition, MEDEF would like the European Commission to assess this global competition process by taking into account the differences between the standards and any requirements in force in these various areas, in particular as regards the environment, in order to identify any additional constraints borne where applicable by European enterprises and that cannot be set off by the action of market forces.

Indeed, it is necessary to make all possible efforts so that European enterprises have the same chances as their foreign competitors to gain market share.

2.- COMPETITION AS A WAY OF PROTECTING THE PROPER USE OF STATE AID

MEDEF remains convinced that it is possible to ensure that competition and State aid are not mutually incompatible.

However, MEDEF notes **the persistent lag existing between competition rules applicable to enterprises and rules imposed on Member States as regards compliance with their own obligations, in particular as regards State aid.**

Thus, as regards State aid granted in the form of a public service compensation, the organisation of a bidding procedure prior to the decision concerning a service of general economic interest is not always required in certain cases, and in particular when such status is granted to another public entity. However, only the organisation of a transparent and non-discriminatory competition procedure makes it possible to assess the need for the aid and its appropriate level.

In the cases of partnerships between the public and private sectors, it is indispensable to ensure that the State aid is granted to the project under the same terms that would apply to the public entity in the absence of any public/private partnership.

As an example in France, in the water and sanitation sectors, concessionaires do not qualify for the aid that is granted by the *départements* or *regions* to public entities when they carry out directly certain water or sanitation works by way of public contracts. Such a competitive distortion is particularly shocking when benefiting an autonomous public entity, i.e. an entity acting as a genuine public enterprise.

In conclusion, MEDEF strongly asks for stricter compliance with the Treaty's rules as regards economic operations of Member States, in particular in France in the area of the environment, through stricter application of the neutrality principle.

MEDEF considers that competition must remain a driving force supporting the optimal allocation of State aid in Europe. It would in this respect be advisable to refer expressly to the benefits resulting from regulated competition as regards services of general interest. Such an assessment would be in line with the European Commission's Green Paper concerning services of general interest.

3.- RELIANCE ON A MORE DETAILED ECONOMIC ANALYSIS HAVING A COMPETITIVE NATURE

The European Commission has given itself the target of applying a more detailed economic analysis of the State aid mechanism. MEDEF insists on the need for the Commission to rely on a more detailed analysis, but most importantly, on a **competitive analysis** in order to treat (characterisation / justification) aid-related measures.

MEDEF may only support such an objective. However, this analysis must be made in a specific legal framework, in particular through **clarification of a number of notions**, such as “State aid”, “advantage” or “qualified investor”. In addition, it would also be advisable to provide clarifications of the concept of “reasonable benefit”.

Such definitions are critical in order to characterize State aid. They imply:

- a clear distinction between the notion of trade allocation among Member States and the notion of competitive restriction; and
- a clear assessment of the market and the competitive terms on that market.

Such assessment must rely on the case law distilled by the Court of Justice of the European Communities by recalling the prohibitions imposed under competition law, must be implemented by a provision setting standards under domestic law and must take the form of interpretation guidelines, as was done by the European Commission in the cases of services of general economic interest².

Such exercise must also refer to the notion of “market failure”. The action plan shows that such notion shall be used primarily in order to justify aid (Article 87.3 of the Treaty), even though it does not a priori seem possible to exclude that such notion may be used in order to characterise the aid (Article 87.1).

In addition, MEDEF insists on the need for **detailed definition and analysis** of the effects taking into account the multiple forms that public aid may take. In particular, the fiscal, taxation or incentive mechanisms are potentially, or de facto, tools for redirecting economic or financial flows towards certain sectors. Special attention must be paid to the cost over-compensation phenomena that can create windfall effects and breach competition rules. These phenomena may result from the superimposition of tax measures in favour of certain policies or measures.

On the contrary, while the State aid reform plan provides for the exclusion of large enterprises only in the case of aid serving a regional purpose as regards “87.3 c)” regions, **MEDEF regrets the interpretation given by the European Commission which seems to create an opposition between large enterprises and SMEs** as regards the grant of certain aid. Indeed, large enterprises have at the same time a jumpstarting effect and a spin-off effect on the local SMEs’ economic environment. The exclusion provided for in the Plan is particularly regrettable in the current environment where regions compete globally in order to attract large enterprises.

² EU framework of 13 July 2005 (“soft law”) on State aid in the form of public sector compensation.

The interpretation proposed by the European Commission is surprising, because, at the same time, the project for the re-allocation of aid in the research and innovation sectors will not have any concrete impact on the growth dynamics, unless through partnerships between large enterprises, SMEs and national and European research centres.

Furthermore, MEDEF emphasises the need for a genuine **competitive analysis**, which implies for the European Commission:

- (i) a true review of the competition allocation criterion (jurisdiction criterion) and the competition restriction criterion (substantive criterion), that may not be confused or deduced systematically one from the other;
- (ii) recognition of the autonomy of the competition restriction criterion from the other criteria (and essentially the measurement selectivity criterion); and
- (iii) an analysis of the market and competitive conditions on this market.

Finally, MEDEF would like that a **stabilised legal framework be prepared by the European Commission in order to govern public/private partnerships for research and innovation** for the purposes of ensuring continuity between research and the bringing to market of the resulting innovations.

4.- THE STRENGTHENING OF TRANSPARENCY, LEGAL SAFETY AND PREDICTABILITY OF LEAD TIMES

4.1 Concerning transparency

MEDEF proposes to the European Commission to strengthen the transparency of the aid grant control procedures.

Among these transparency rules, MEDEF proposes, in order to support the approach initiated by the European Commission:

- involving the beneficiary enterprise, along with the Member State, in the individualised procedures, in addition to the diplomatic channels that have been used heretofore;
- determining a “reasonable” term at the end of which the European Commission’s silence is deemed acceptance of the notified aid, e.g. 4 months;
- creating a system for monitoring the progress of the procedure within the European Commission by way of an Internet connection reserved for the beneficiary enterprise;
- facilitating on-site control by the European Commission in order to eliminate constraints associated with the Member State’s interface;
- obliging Member States to repay unlawful aid by imposing compliance with lead times.

It would furthermore be indispensable to broaden enterprises’ access to information on aid granted by Member States through a notification procedure and in particular extending access to data on aid granted to any competing enterprise.

4.2 As regards legal security

- Concerning additional investigation powers

It is necessary to emphasise that, if the purpose of these powers is to enable the European Commission to carry out an **economic and competition analysis of the relevant measure, then such powers must be approved**. On the contrary, if the purpose were to grant to the European Commission powers as broad as those recognised for the control of anti-competitive practices, then such powers would hardly be justifiable in the area of State aid and would in any event require a substantive strengthening of the procedural guarantees afforded to enterprises.

- Concerning the rights of third parties and in particular beneficiary enterprises

It is highly regrettable that no provision of the Action Plan refers to these rights, while they are a major concern of enterprises, whether they are beneficiaries or complainants.

In this respect, several points need to be emphasised:

- a **distinction should be made in the procedural rules** between “individual notification” procedures and “aid rules notification” procedures;
- as indicated above, as part of individualised procedures, **beneficiary enterprises should be closely involved in the procedure**, which implies the possibility of being heard by the Commission during such procedure;
- it is necessary to find solutions in order **to remedy the lack of information available to enterprises** (difficulty for enterprises of knowing whether an aid or an aid scheme has been notified or falls within the scope of a block exemption, difficulty of obtaining information on the status of the procedure or on the information available to the Commission). Therefore, the proposal made by the Commission for the supply of information on the Internet must be approved. However, such proposal remains insufficient, and it is important that other improvements be made as part of the amendments to the procedural rules. The creation of national independent authorities responsible for supporting the European Commission as regards the implementation of the State aid rules should also contribute to improving the information available to enterprises;
- the beneficiary enterprise might be entitled to substitute for the defaulting State, that omitted to effect the required notification, by giving notice, the State being then responsible for indemnifying the enterprise for the expenses that it has incurred.

Finally, it is necessary to examine the issue of the damage sustained by enterprises required to reimburse aid, while the fault is attributable to the State. Indeed, the reimbursement of the aid may create a specific damage, for instance if steps have been taken that would not have been taken in the absence of aid and where the enterprise had valid grounds to consider such aid as lawful and compatible, taking into account the trust that it may legitimately have in government institutions.

The national independent authority envisaged by the European Commission might be asked to order all-in indemnification in restrictively limited cases. This would avoid cumbersome and particularly uncertain indemnification procedures. Certain standard cases might be provided for, e.g. the case of aid serving to fund an investment that is not recoverable or that has been impaired.

While enterprises would always be entitled to seek indemnification by filing a court action, this streamlined procedure managed by an independent authority would facilitate indemnification. This grant of jurisdiction would prompt the States to comply with EU regulations.

- Concerning the creation of independent authorities

It is certain that, for enterprises, legal insecurity primarily results from the risk of reimbursement of the aid, even though the notification obligation is solely incumbent on the State and not on the enterprises, and the latter have no means of ensuring that the notification has been properly carried out. It is also necessary to emphasise the fact that such legal insecurity affects not only the beneficiary enterprise but also its partners, whether commercial or financial.

The creation of independent authorities might constitute a significant advance for enterprises, provided that such authorities adjudicate only on form and do not substitute for the European Commission or the Member States as regards the decision on the merits. In addition, it would be necessary that their jurisdiction also covers the control of the notification of the aid and that the results of their review be readily accessible for the enterprises.

However, it would be preferable to rely on an existing authority, provided that such authority has undeniable powers and actual independence.

4.3 Concerning lead time predictability

Although we must commend the European Commission's resolve to reduce lead times through a Code of Good Practice, **it is strongly advisable to amend the procedural rules as regards this issue.** The procedural rules should provide for lead times that are imperative and shorter, in respect of the procedure following the decision to open an in-depth investigation (Article 88§2 of the Treaty).

5.- ADOPTION OF A BLOCK EXEMPTION

The adoption of a general block exemption might also be an interesting way of improving the management of the State aid control. Such a measure should in any event be preceded by an **in-depth economic analysis of the sectors likely to benefit therefrom and/or the types of aid concerned, in particular on the basis of the definition of the notion of market failure.**

However, decisions and frameworks approved at an earlier date must remain legally autonomous, in particular as regards State aid granted in the form of a public sector compensation.

It remains, nevertheless, that this block exemption must make it possible to avoid any drift in the grant of State aid through an increase of its volume on the territory of the European Union. Furthermore, such a text must not generate any competition mechanism in the grant of aid between Member States, to the detriment of solidarity within the European Union.

