



STATE AID ACTION PLAN

LESS AND BETTER TARGETED STATE AID: A ROAD MAP FOR STATE AID REFORM 2005-2009

COMMENTS BY LAWRENCE GRAHAM LLP

The European Commission's State Aid Action Plan covers three broad themes: the aims of the reform of state aid policy; the key priorities for a reformed state aid policy; and modernisation of the practices and procedures of state aid. We set out below Lawrence Graham LLP's brief comments on each of these. Lawrence Graham LLP also supports the submission made by the Competition Law Association, of which Lawrence Graham's state aid practitioners are members, and for the sake of expediency the views expressed in that submission are not repeated below.

1. AIMS OF THE REFORM

The Action Plan clarifies that there are four main elements to the reform:

- a) Less and better targeted state aid;
- b) A refined economic approach;
- c) More effective procedures, better enforcement, higher predictability and enhanced transparency
- d) A shared responsibility between the Commission and the Member States.

We agree that these are all vital components of any reform of the state aid rules. In particular, we agree that an economic approach will prove useful. The adoption of such an approach is in line with other reforms that have taken place recently in EU competition policy, which are proving to be effective.

However, given the recent enlargement of the EU and the fact that many new Member States may well be finding adjustment to the EU state aids regime to be one of the more difficult aspects of their membership, the introduction of an economic approach will need to be accompanied by detailed guidance (and perhaps even training of relevant Member State officials). In particular, the concept of analysing the market failure at stake, which the Commission considers in the Action Plan, is complex. In the circumstances in which aid is granted quickly, it may be difficult to carry out a full market assessment in the time period available. Guidelines from the Commission would enable this assessment to be undertaken within a clear framework.

We set out more detailed comments on (a) in section 2 below and on (c) and (d) in section 3 below.

2. KEY PRIORITIES FOR REFORM

The Action Plan sets out a number of priorities for a reformed state aid regime, within the context of the general aim of less and better targeted state aid. Whilst we agree that better targeted state aid is a key objective, we do not agree that less aid per se is necessarily better aid. Whilst the European Council has called for a reduction in the general level of state aid and a redeployment of aid in favour of certain horizontal objectives, it is not clear that these two aims are compatible. Particularly in areas such as stimulating entrepreneurship, the modernisation of transport, energy and communications infrastructures, and innovation and R&D, the need for aid may in fact require an increase in the general level of aid granted, at least in the short to medium term.

Furthermore, the objective of less aid in itself may in reality have the opposite effect from that which is intended. The modernisation of state aid policy is expressed in the Action Plan to be taking place in the context of the Lisbon Strategy for growth and jobs. However, both of these aims may be frustrated (at least in part) by a policy that seeks to reduce the level of aid, for the following reason. Whilst less aid may help to create a level playing field *within* the EU, and therefore stimulate intra-Community trade (and therefore growth and jobs), the EU cannot afford to lose sight of its position on the global market. The EU would not wish to find itself competitively disadvantaged on the worldwide market as a result of a general policy of reducing the level of state aids.

We have the following further comments on individual aspects of the key priorities set out in the Action Plan:

2.1 Targeting innovation and R&D to strengthen the knowledge society

We agree that this should be a major priority of state aid reform, and also of the EU's economic growth in general. However, we consider that there is a balance to be struck between providing clear guidance on when aid should be granted in this area (under the proposed Framework for R&D and Innovation) and the freedom that is required to respond to novel situations thrown up by research. For this reason, we do not agree that any such Framework, or indeed any general analysis of the market failures that inhibit innovation, should seek to be comprehensive.

The Action Plan also refers to the importance of public private partnerships in the R&D field. We consider that public private partnerships will increase in importance in a number of sectors throughout the EU and that attention should be given to the interaction of the state aid, public procurement and competition rules in this area.

2.2 A focused regional aid policy

We consider that the enlargement of the EU in particular has brought about a need for a reconsideration of the policy on regional aid. The Commission recognises this in the Action Plan. Given that regional aid is one of the most important facets of state aid policy, we would welcome further detail from the Commission as to what is envisaged.

One area in particular in which the reform of regional aid could have a significant impact is regeneration of urban areas and the development of rural areas. Whilst post-enlargement, certain urban and rural areas may not be considered to be the least-developed regions of the EU (and may not therefore qualify for aid under the reformed policy), it is vital that programmes that seek to improve such areas should not automatically be rejected as candidates for aid. The danger is that failure to support such areas in favour of areas that are currently even less developed could, in the medium term, result in a shift of wealth such that these areas themselves end up as the least-developed. For this reason, it is important that the Commission, as promised in the Action Plan, examines carefully what aid can be justified outside the least-developed region. It is also vital, as indicated above, that the aim of less aid does not trounce the more important objective of better targeted aid.

3. PRACTICES AND PROCEDURES

The themes that emerge from this section of the Action Plan echo the developments that have taken place in other areas of EU competition law, in particular the increased involvement of Member States and encouragement of private actions. The Action Plan refers to this as a "shared responsibility with Member States". We agree with the Commission that in order for this to become a reality, best practice guidelines will be required.

The Commission also moots the possibility that independent authorities in Member States could monitor the compliance of Member States with the state aid rules. Whilst we understand the reasons for this suggestion and see that there is some merit in it, we question whether this would simply increase bureaucracy and paperwork (contrary to the aims of the Action Plan), and query what powers the 25 individual authorities would have to enforce the state aid rules in the event of a Member State breach. Moreover, we question how independent such national authorities could really be, as it is likely that they would be subject to a degree of political influence (particularly if they are funded by the relevant national government). An alternative option to consider would be for the Commission to set up a further division within DG Competition that is responsible purely for state aid enforcement. In this way, monitoring would be centralised and would be carried out by the Commission which has the power to enforce the rules. This would ensure consistency of application throughout the EU. This, together with increased private litigation (as suggested by the Action Plan), could prove to be the more effective way of ensuring that Member States comply with the state aid rules.

We support the Commission's suggestion for amending the procedural rules. However, we question whether some of the options suggested are achievable. In particular, we query how the Commission plans to introduce a deterrence mechanism for measures that have not been notified – if the aid has not been notified, the Commission will not necessarily know that the aid has been granted. If the Commission wishes to save time, would the consultation of market participants actually counter this aim? Could the Commission really increase efficiency by committing to conclude an investigation in a shorter time-frame, or could this have the opposite effect?

We agree that a comprehensive review of the remaining documents will also be a useful exercise. However, we consider that the best approach would be to aim to reduce the number of documents that relate to state aid with a view to increasing efficiency and transparency. Rather than introducing new block exemptions (for example, for cinema, as suggested in the Action Plan), we consider that the wiser course of action would be to attempt to draft the proposed consolidated block exemption as widely as possible, to cover as many sectors as possible, and where necessary to back it up with guidelines specific to each sector. That way, the legislative position is consistent and the sectoral focus is limited to guidance on that legislation.

Lawrence Graham LLP would welcome the opportunity to comment further on the different aspects of the Action Plan as the Commission develops them. Please contact Anthony Woolich (anthony.woolich@lawgram.com or +44 20 7759 6549) or Rosie Choueka (rosemary.choueka@lawgram.com or +44 20 7759 6724).