

**RESULTS OF THE CONSULTATION  
ON THE STATE AID ACTION PLAN (SAAP) –  
DETAILED SUMMARY**

(09/02/2006)

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## **I. INTRODUCTION** (*SEE ANNEX FOR DETAILED STATISTICS*)

### **1. METHODOLOGY**

The State Aid Action Plan (SAAP) launched a public consultation on the reform of State aid policy. The document did not ask specific questions, but presented two elements: i) the underlying reasons and guiding principles for State aid reform and ii) a roadmap for the revision of the State aid rules, the aim being to improve administration and procedures. The purpose of the consultation was therefore to assess whether State aid reform is desirable and whether the proposed approach was adequate.

Given the political nature of the document, and given that it did not enter into the technicalities of the planned changes to the rules and procedures, most of the comments received were at a general level and essentially consisted of support for or reservations on the measures proposed in the Action Plan. In addition, some stakeholders provided detailed comments on a number of points of particular interest to them.

Consequently, the Commission conducted its analysis on two aspects: first, whether or not stakeholders supported the measures put forward in the document, and second, what kind of comments they made. The Commission proceeded with systematic coding of the 134 answers received: 93 items were identified as specific proposals in the SAAP; for each of them the Commission recorded whether the reply supported or opposed the proposal; 22 themes were also identified where key comments were registered.

The analysis was then organised along the themes and chapters of the State Aid Action Plan, analysing the degree of support for the measures as well as the comments received.

### **2. THE RESPONDENTS**

**The consultation on the State Aid Action Plan raised considerable interest:** the Commission received **134 contributions** from **23 countries**, of which **2 non-EU countries**; in addition 26 respondents represent **EU-wide interests**. In particular, 21.64% of the replies come from the UK, 19.40 % from respondents of an EU-wide nature, 14.93% from France and 12.69 % from Germany.

**The 134 respondents are: 20 MS, 25 regions** or regional associations, **35 business federations, 14 companies**, 10 trade unions, **9 regional development bodies** (regional entities combining public and private stakeholders), 8 law firms or associations, 5 non-business associations, 4 institutions and 4 academics.

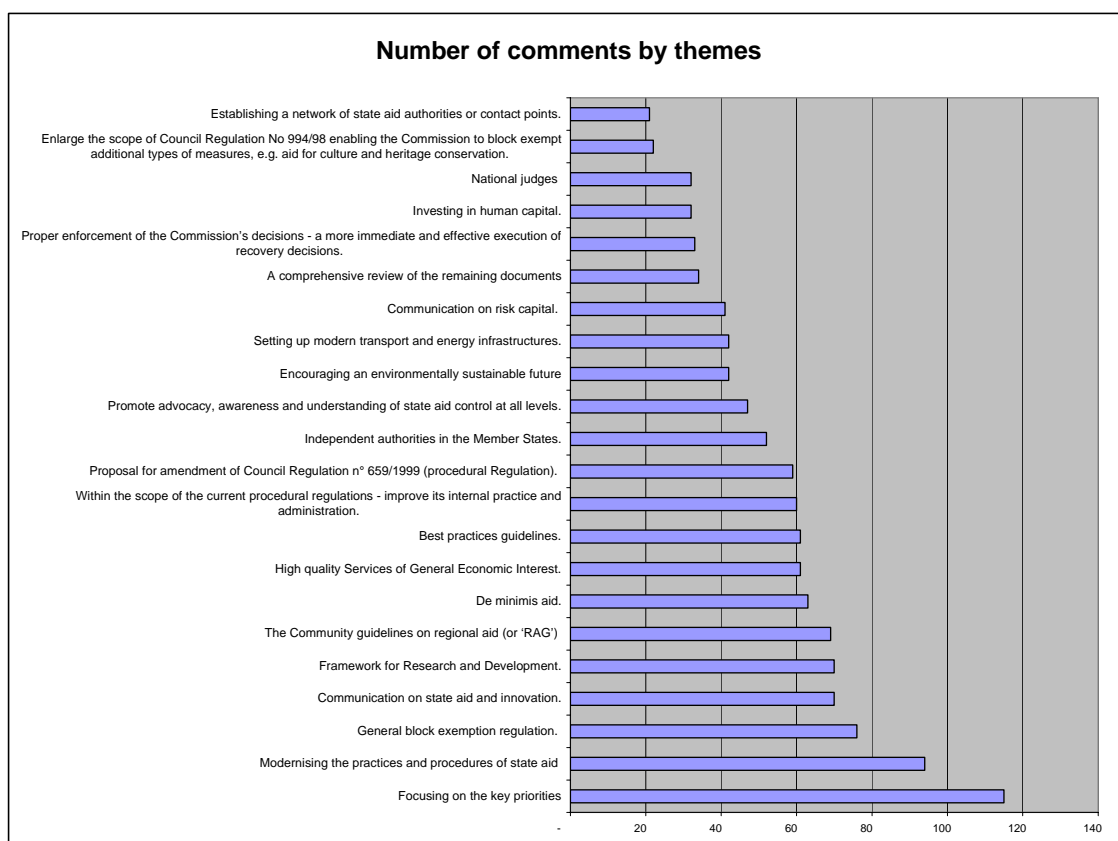
**44.03 % (59) of the respondents are from the public sector, and 49.25% (66) from the private sector; 9 respondents (6.72%) are regional development bodies**, i.e. entities combining public and private stakeholders at local level, thus public-private and regional in nature.

### 3. TYPOLGY OF COMMENTS

Few respondents deal with all aspect of the State Aid Action Plan (SAAP), **many focusing on one, or only on a few specific points**. Similarly, whereas some contributions give extensive comments, some are short and only give general comments. The logic and main characteristics of the SAAP are welcomed and well-understood. However, some respondents note that numerous points referred to in the text raise questions to which answers cannot be found directly in the SAAP. Generally, the respondents wish to **contribute to future reflection on the basis of more specific texts**.

Many respondents are practitioners who are confronted with State Aid rules on a regular basis: MS, regions and public-private regional development bodies but also private companies, law firms and experts. Their contributions are often practice-oriented and based on concrete situations. Stakeholders less directly involved with State aid practice, such as trade unions, associations, non-business stakeholders, academics and institutions, bring a different, more distant, and sometimes more theoretical point of view.

Annex II shows how much respondents commented on each of the themes. Most of the respondents from all types **commented mainly on part III** (Focusing on Key Priorities): 115 replies; **and on part IV** (Modernising the Practices and the Procedures of State Aid) of the SAAP: 94 replies. Part III of the SAAP dealt with sectoral issues, the discussion on which had often already started; however, it also resulted in new respondents taking part in the debate and new ideas appearing. Part IV introduced a crucial new topic: **procedural reform**. No precise proposals were made by the Commission regarding procedures and practices, but comments were **extensive and a series of proposals (sometimes very detailed) were provided** by the respondents. Part V (A comprehensive review of the remaining documents), which concerned very specific texts, was commented on by 34 respondents, mainly MS and business federations. It thus appears that two themes have attracted most interest in the comments: i) the contribution of State aid policy to the Lisbon Strategy and ii) improving State aid procedures and administration.



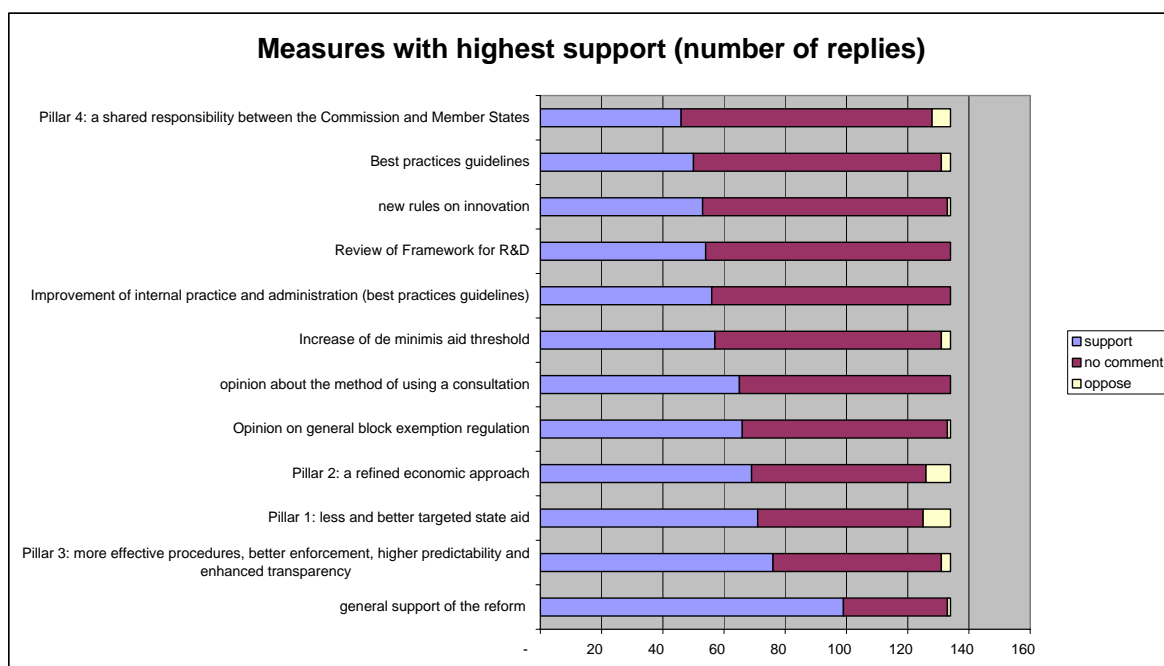
#### **4. CLEAR SUPPORT FOR THE REFORM**

In general, **most of the comments received tend to express support for the reform** and for the proposals put forward in the SAAP: in total, over 75% of the comments analysed tend to be supportive while **99 respondents (98% of replies on that aspect) explicitly support the reform**, with only one respondent sceptical about it (a trade union). This is a welcome result of the consultation process, even though it may not be surprising, since the reform proposes in essence to improve the current state of State aid policy. In addition, support for the reform appears to be linked to perceived shortcomings in the present State aid policy, notably the lengthy procedures, the administrative burden and the complexity of the current rules.

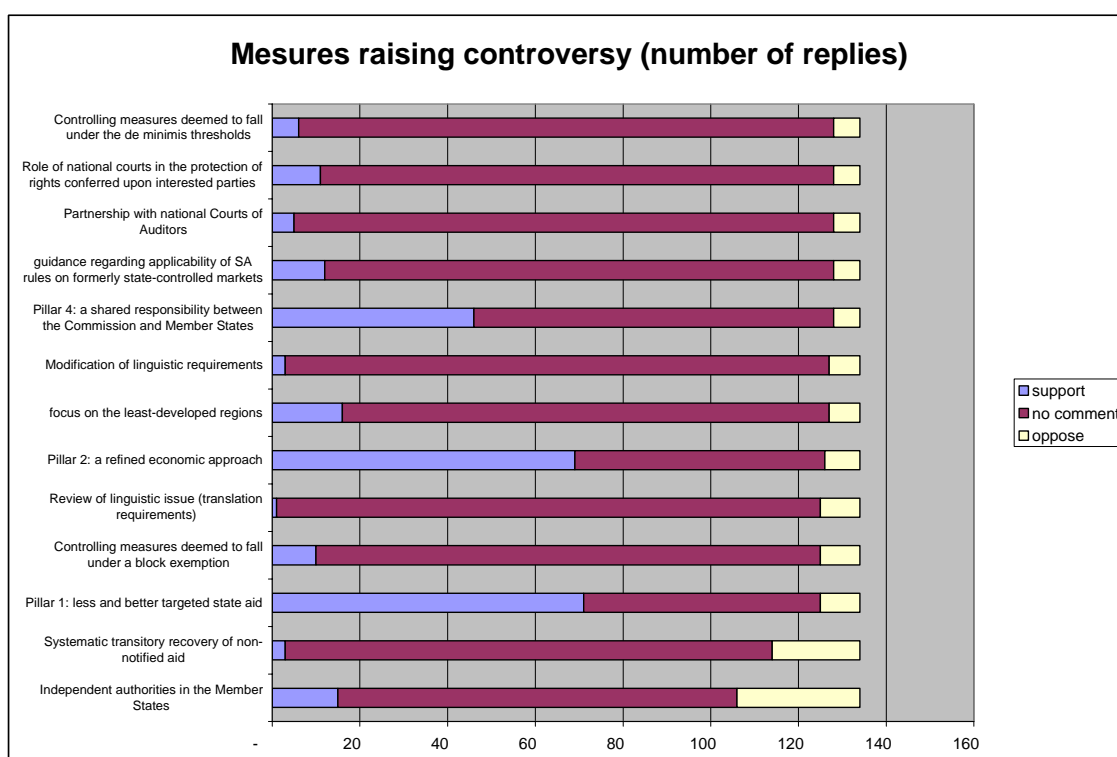
Support is also clearly expressed for the four proposed pillars of the reform:

- less and better targeted aid (71 replies in support - 78% favourable opinions)
- refined economic approach (69 replies in support - 79% favourable opinions)
- more effective procedures, better enforcement, higher predictability and enhanced transparency (76 replies in support - 92% favourable opinions)
- shared responsibility between the Commission and Member States (46 replies in support - 77% favourable opinions)

Besides general support, the comments are particularly supportive of proposals in favour of the Lisbon Strategy and those aimed at improving the procedures of State aid and reducing the administrative burden. This can be seen from the points that received most support, as illustrated in the following figure:



Some parts in the SAAP, however, also raise **controversy** and more negative comments. A few contributions question the pillars for reform: 9 respondents (2 regions and 5 trade unions from Germany, and 2 French private stakeholders) question the principle of “less and better targeted State aid” – especially the idea of less aid –, 7 respondents (6 of them German) are sceptical about the refined economic approach, 6 respondents (5 of them public bodies) have misgivings as regards putting more responsibility on Member States. Some controversy also relates to procedural aspects, notably regarding decentralising some State aid control or, conversely, increasing scrutiny of notification obligations and block exemptions.



Finally, some proposals, which were commented upon by few respondents, received more opposition than support. The following table lists all of these measures: it appears that they have to do with procedural matters mostly; for some of them that received very few comments, the perceived opinion may have limited statistical validity. Most striking is the opposition to the review of the linguistic issue (from MS and regions), which currently requires translations in all 20 official languages, opposition to systematic transitory recovery of non-notified aid (20 replies against, including 7 MS and 6 regions, and altogether 9 negative replies from Germany) and opposition to independent authorities in the Member States (28 negative replies, including 8 MS, 8 regions and several business associations).

	support	oppose
Expand scope of the Notice on cooperation between national courts and the Commission to other national bodies	-	3
Written procedure for the Advisory Committee on SA.	-	1
Review of linguistic issue (translation requirements)	1	9
Systematic transitory recovery of non-notified aid	3	20
National courts able to apply block exemptions by declaring not only the compatibility, but also the incompatibility of certain aid	1	3
Modification of linguistic requirements	3	7
Independent authorities in the Member States	15	28
Extension of the 'notice on the application of the State aid rules to measures relating to direct business taxation' to indirect taxation	2	3
Setting of "positive" and "negative" priorities	3	4
Partnership with national Courts of Auditors	5	6

Other than these 10 measures with overall negative review, all the other 83 measures outlined in the SAAP received overall positive support, some of them receiving only positive comments. However, for a more nuanced picture of the general reaction of stakeholders, the comments received need to be looked at more closely.

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

### **1. GENERAL COMMENTS**

As already indicated, the consultation shows wide support for the 4 proposed pillars for reform put forward in the State Aid Action Plan. Specific comments, however, are also made on points that were not covered in the proposals of the SAAP, or on certain aspects of the general approach:

1. Many respondents stress the need to **reduce the administrative burden**.
2. One general comment is that the SAAP neither embraces, nor responds to the wider challenges of **globalisation**. 26 respondents from all types explicitly underline this point: 6 MS, 10 business federations, and also 3 regional development bodies, 2 regions, 3 law associations, 2 institutions. A few



respondents urge the Commission to act at WTO level; for example, as one business federation calls for it, through helping tighten international rules on aid and subsidies. Another business federation suggests that the Commission should benchmark State aid practices at international level, the results of which should be taken into account when applying European State aid legislation.

3. **Some respondents question the objective of ‘less and better targeted State aid’:**

- i. 11 respondents, including 7 trade-unions and 2 law associations, question the systematic tying between (lesser) quantity and (thus improved) quality of State aid: less aid per se is not necessarily seen as better aid. 5 respondents (all French and all types) underline the risk of allowing only “Lisbon objectives-oriented” State aid, to the detriment of the wider concept of State aid. As a consequence, this might weaken the position of European companies within international competition.
  - ii. Compatibility between “less aid” and redeployment of State aid in favour of certain horizontal objectives (need for aid for horizontal purposes may require an increase in the general level of aid granted, at least in the short to medium term).
4. Several respondents question whether the SAAP complies with the **subsidiarity principle**, and suggest a realignment of State aid. 17 respondents of all types mention this, from both public and private sectors (5 of them German and 5 French). They argue that flexibility must be maintained and that MS must be able to appreciate the opportunity of granting certain forms of State aid. One business federation suggests that the Commission should formally acknowledge the legitimacy of State action.
5. A number of respondents insist that the **role and rights of third parties** (e.g. the beneficiaries of aid or their competitors) must be increased.
6. **12** respondents (6 regions, 2 business associations, 2 associations of lawyers, 1 law firm and 1 company) express concern about the inconsistency in terms of policy, legal reasoning, economic analysis and procedure which may arise as a result of **decisions being made in a range of different DGs (Comp, Tren, Agri, Fish)**. 1 law firm and 1 company believe that a demarcation between DG Comp and DG Tren is no longer justified because they purport to apply the same principles and that responsibility for State aid cases involving transport should be reassigned to DG Comp. 1 business association and 1 region even think that DG Comp should have an exclusive remit to deal with State aid and the involvement of other DGs should be limited. 1 association of lawyers made a proposal that there should be a centralised State aid authority within DG Comp working in consultation with the other DGs concerned.
7. Some respondents highlight the need to **clarify** what the **concept of State aid** covers. The Commission could issue detailed guidelines that clarify its policy on the definition of aid in line with the European Court of Justice’s cases law. (Guidance on the concept of State aid should cover in particular the concepts of: “private investor”, “selectivity” and “distortion of trade in the EU”.)

8. Some responses also warn that the various **reforms in State aid policy** should **not be disconnected** from other Community reforms and policies (Financial Perspectives, Cohesion and Regional policy, Environment, Research & Development).<sup>1</sup>

## **2. THE ECONOMIC APPROACH**

Accentuating **the economic approach is welcomed** and has raised a series of comments and questions:

1. 69 respondents support the introduction of the **“market failure”** criterion. However, 8 respondents, including 2 MS and 3 regions, are not in favour of using such analysis: they fear that giving priority to this criterion could go against the subsidiarity principle and limit governments’ margin for manoeuvre in carrying forward their policies.
2. At the same time, 26 respondents explicitly wonder whether “market failure” will be the only criterion in the economic analysis: the use of **more criteria** (such as the “relevant market”, the return on investment test, efficiency, proportionality, consumers’ interest, global industrial and competition objectives...) is a recurring request.
3. 31 respondents **specifically ask for more details**, more definitions (“market economy investor principle”, “advantage”), more rigour (especially concerning the “affectation of trade” and the “distortion of competition” criteria, which are identified as one of the main sources of legal uncertainty, given the allegedly non-systematic and non-argued way the Commission applies them at present), and a clear calculation methodology, in order to improve transparency and legal certainty, while decreasing the administrative burden. In particular, regional authorities fear “paralysis by analysis” when undertaking an economic assessment of aid and it proves too complex, and ask for more information and explanations of the texts.

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<sup>1</sup>One business association pointed out that the **gender or equal opportunities** dimension is **missing from the SAAP**. State aid to support the fuller integration of women in the labour market but also in the entrepreneurial community is of the utmost importance; this is in line with the Lisbon Agenda and should therefore be included in the Action Plan.

**In the following sections, the original text of the SAAP has been reproduced in *italic* to facilitate the reading and understanding of the comments received.**

### **III. FOCUSING ON KEY PRIORITIES**

The topics most commented on were the following: innovation and R&D (Research & Development), which the respondents generally linked, Services of General Economic Interest (SGEI), general block exemption regulation, *de minimis* aid, and regional aid.

#### **1. COMMUNICATION ON STATE AID & INNOVATION** **FRAMEWORK FOR RESEARCH & DEVELOPMENT (R&D)**

*Europe's future economic development depends on its ability to create and grow high-value, innovative and research-based sectors capable of competing with the best in the world. This priority of knowledge and innovation has been clearly endorsed in the Communication to the Spring European Council.*

*In this context, in 2005, the Commission will adopt a **Communication on state aid and innovation** which will analyse the need and the potential to adapt existing rules in order to create the appropriate framework conditions to foster innovation in the EU. This will complement the Competitiveness and Innovation Framework Programme. Innovation is related to a process connecting knowledge and technology with the exploitation of market opportunities for new or improved products, services and business processes compared to those already available on the common market and encompassing a certain degree of risk. This process may be hampered by market failures (mostly externalities, public goods and imperfect information leading to inefficient dissemination, insufficient funding and labour market mismatches). State aid can be justified when it is necessary to increase the incentive to innovate and when it does not lead to a crowding out of private initiatives or to unfair competition.*

*The Commission's Vade mecum on Innovation has shown that a number of possibilities already exist to grant aid to target the market failures which are hampering innovation activities, but that the rules could nevertheless be improved.*

*Additional possibilities will be analysed to cover measures which can boost innovation in the common interest. **Particular attention will e.g. be paid** to the specific situation of small and medium-sized enterprises, to the role of intermediaries (e.g. clusters, technology centres) and to highly-skilled researchers working in the area of innovation. The specific amendments suggested in the Communication will subsequently be made when the relevant rules are revised.*

*In addition, the Commission will modify the Community **Framework for Research and Development**, in the light of the Lisbon and Barcelona objectives. This review will also seek to better take into account the priorities of the Community's R&D policy such as the promotion of cross-border research cooperation, public-private research partnerships, dissemination of research results and important research projects of common European interest. State aid to R&D could enable Member States to target market failures and provide the right incentives for industry to invest more in R&D. The Commission will 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.*

*The framework should also take account of the growing importance of public private partnerships in the R&D field. In particular, it should provide for adequate provisions for collaborative research including the ownership of, access to and exploitation of Intellectual Property Rights obtained in such projects. Furthermore, the need to allow for aid for dissemination will have to be considered in the course of the review. The Commission will*

*also consider if the scope of the framework should be extended to cover types of aid in favour of certain innovative activities, not already covered by existing guidelines or regulations thereby creating a **Framework for R&D and innovation**. In addition, if the Commission can establish clear and general compatibility criteria on the basis of experience, it will exempt certain aid measures from the obligation to notify to the Commission.*

## INNOVATION AND R&D: COMMON REMARKS

83 respondents commented on at least one of the R&D and innovation issues, and 57 dealt with both topics at the same time. Many comments highlight practical problems of applying the rules.

1. There is a general call for **clearer definitions** (“intermediaries”, “eligible costs”) and **examples**, especially regarding permissible aid.
2. Many ask for **more flexibility regarding the rules** (concerns about facing new situations and about the margin of manoeuvre for governments).
3. Many respondents, especially business federations, MS and regions, stress the **need to encourage clusters**, networks and mega-projects.

## INNOVATION

Half of the respondents (70) touched upon this topic.

1. The review is welcomed by all types of respondents (53).
2. 19 respondents, 9 from the public sector, but also 4 business federations, 5 trade unions and 1 regional development body, **support a wider definition of “innovation”**. 1 business federation, 1 company and 1 institution disagree with such a proposal. Some question the focus only on high tech, NTICs (New Technologies of Information and Communication) or even technology as such. Some suggest the inclusion of mature industries in need of repositioning, established businesses, cover for non-technological forms of innovation (such as detailed market studies to identify new concepts and technologies, creation & design, or innovation regarding company management), etc. 2 regional development bodies ask for more details regarding permissible aid.
3. 10 respondents, of which 7 regions, 1 MS, 1 regional development body and 1 business federation, call for more provisions encouraging collaboration, for example regarding intermediaries such as local authorities, clusters, PPPs.
4. 7 respondents from the public sector (of which 6 MS and 1 region) underline the lack of legal certainty or ask for better definitions.
5. 2 MS and 1 region want **the definition of SME to be amended**.
6. **Concerning the assessment criteria**, 5 respondents (3 of them institutions) support restricting it to “**market failure**”, while 3 (business federations) specifically ask for **innovation** to be a justification for State aid.
7. While the focus on SMEs is generally supported, 5 business federations disagree with **what they perceive as discrimination against large firms**, whereas one

(representing SMEs) explicitly supports it. Special access to public tenders is required for SMEs.

8. Regarding the scope of the text, 2 MS want broader scope, 1 is against it. Some MS also underline that other non-State aid measures are necessary to support innovation.

## R&D

Half of the respondents (70) commented on this topic.

1. A majority **welcome the review. Provisions about Public Private Partnerships (PPPs) and Intellectual Property Rights (IPR) are generally welcomed.**
2. Legal certainty remains a problem for many respondents (both private and public), who ask for better definitions, especially in a general Framework for R&D and innovation or a block exemption regulation.
3. 8 respondents ask for **clearer definitions and more examples**. In particular, 6 (2 from the public, 4 from the private sector) **question the separation of "pre-competitive development activity" and "industrial research" in two categories.**
4. 17 respondents explicitly **support the extension to a Framework for R&D and innovation.**
5. 7 respondents (from both the private and public sectors) underline **practical difficulties** (sometimes with many examples or details) **with the current IPR regime** and call for more flexibility.
6. 13 respondents (half of them from the public, half from the private sector) are **concerned with the current PPP regime**, especially as far as 3 business federations are concerned, regarding the different roles of public entities (direct/indirect aid, collaborative/contract research)
7. 15 respondents (mainly regions and business federations) want more favourable provisions regarding collaboration and clusters, notably through better provisions for PPPs. Some suggest block-exempting big trans-national projects of Community interest or favouring three-way cooperation (companies-universities-public authorities)
8. 24 respondents (half from the public, half from the private sector) support a **wider scope of aid**, while 2 (1 MS, 1 social partner) question it. 5 respondents call for **thresholds to be raised**. A generalised tax credit on R&D spending for R&D-intensive industries is suggested.
9. 6 replies request **better coordination of SA rules with other Community texts**: environment, regional policy, health, the R&D Framework Programme and risk capital, for example as justification for aid in the R&D domain. 1 business federation calls for an increased sectoral approach.
10. Some respondents (6 business federations and 1 MS) want the **local disparities within the EU or with countries outside the EU** to be taken into account and discussed at the WTO.

## **2. HIGH QUALITY SERVICES OF GENERAL ECONOMIC INTEREST (SGEI)**

*The provision of effective and high quality **Services of General Economic Interest (SGEI)** is a key component of the European welfare state and is essential for ensuring social and territorial cohesion, including in the field of education, training and culture, and for the exercise of an effective citizenship. High quality SGEI also contribute to the competitiveness of the European economy. Member States enjoy a wide margin of discretion when deciding whether and in what way to finance the provision of services of general economic interest. However, to avoid distortion of competition the compensations granted should make the performing of public service missions feasible without leading to overcompensation and undue distortions of competition.*

*The White paper on services of general interest announced that the Commission would adopt legislative texts to provide more guidance on this principle. To increase legal certainty, the Commission will adopt a Decision on the basis of Article 86.3, and guidelines to specify under which conditions public service compensations which constitute state aid are compatible with the Treaty. The Commission Decision would grant an exemption of notification for small scale compensations. Special conditions should also apply to hospitals and social housing companies. Finally, the Commission will adapt the transparency directive, to take account of the evolution of the jurisprudence of the European Courts.*

**Almost half of the respondents (61 - all types)** responded to (and often commented on) this topic, many referring to previous position papers.

More than half come from the public sector (13 MS, 17 regions, 2 public companies and 1 federation of public companies), 25 from the private sector (including 7 companies, 9 business federations, but also 5 trade unions). Each block is quite homogeneous regarding its position on this issue.

The private sector stakeholders who responded to this topic are generally active in this sector and directly concerned. They sometimes share the same views as the public sector.

1. There is a general support for the upcoming decision (49 for, 5 against), and its provisions regarding small-scale compensations (20 for, 3 against) and exemptions regarding social housing and hospitals (19 for, 3 against).
2. **17 stakeholders from all types** (including 6 regions and 3 MS) explicitly advocate a **wider scope of exemptions and special treatment**.
3. **26 respondents of all types** (including 7 regions, 6 trade unions, 4 MS and 4 business federations) **highlight the lack of legal certainty**, leading to difficult implementation, through examples regarding the texts, the concepts, and the connection between the texts and the Altmark criteria.
4. **This is why both public and private sectors ask for more details concerning concepts** such as “reasonable profit”, “compensation/subsidy”, “proportionality”, “necessity”, “undercompensation”, “overcompensation”, the Altmark criteria, **situations not covered by the proposed texts**, and the **modus operandi between the different texts**. However, the reasons for those concerns are different: public entities are concerned with “user-friendly” texts and the risk of administrative burden. Some private stakeholders see more detailed definitions as a way of restricting the scope of State aid.

5. 9 public stakeholders, and 3 private ones (2 being opposed to it), support a wider scope of exemption, especially in the **health sector** and even the **social sector** as a whole.
6. **A few disagreements** persist regarding the special treatment of **hospitals and social housing**, especially on the scope of the text and the definitions: many stakeholders, mainly public, call for a wider scope, only one private stakeholder disagreeing with the exemption in that area.
7. On the public side, 4 stakeholders are concerned that the **subsidiarity principle** might be threatened: more margin for manoeuvre should be granted to authorities.
8. **On the private side, stakeholders underline a series of practical points:**
  - 3 respondents (mainly large companies or respondents from the UK) suggest that a **competitive tender** is a sufficient condition to ensure that the “**minimum necessary**” was paid.
  - Concerning notification provisions, 4 stakeholders want the threshold for turnover to concern the service, not the legal entity.
  - One stakeholder felt there should be clearer provision for benefits to be allowed when providing a SGEI.
  - One stakeholder mentions discrimination against private firms when deciding who will be in charge of an SGEI.

### **3. GENERAL BLOCK EXEMPTION REGULATION & DE MINIMIS AID**

#### **GENERAL BLOCK EXEMPTION**

*To ensure better governance and facilitate the granting of aid, which is clearly compatible with the Treaty, the Commission will issue a **general block exemption regulation** to exempt certain categories of aid from the obligation to notify to the Commission. The regulation will be based on the principle that state aid policy should focus on the most distortive types of aid and that it should set clear “positive” and “negative” priorities.*

*The Council has enabled the Commission, through the Enabling Regulation, to exempt certain areas in which the Commission can define general compatibility criteria, which should lead to the same interpretations in different Member States. The Commission has the power under certain conditions to exempt aid related to SMEs, R&D, environment, employment, training and regional development. In the general block exemption, the Commission intends to **simplify and consolidate** the existing block exemptions (training, SME and employment) and integrate a **broad range of exemptions**, notably as regards aid to support SMEs and R&D. Categories of aid which can be clearly defined may fall within the scope of a block exemption regulation, whilst for some forms of aid which cannot be precisely defined in advance, guidelines may constitute a more flexible instrument.*

*The Commission will also consider integrating some categories of aid, such as regional and environmental state aid and rescue aid for SMEs while addressing the problems raised by cumulation of different types of aids. The Commission will also consider exempting larger amounts of aid than presently, on the basis of economic analysis and experience. However, this will be made on the condition of greater responsibility by Member States in **complying with the rules and criteria** set by the block exemptions.*

**76 respondents touched upon this question, of which 30 public stakeholders, 38 private stakeholders, and 8 regional development bodies. A wide majority** welcome a general block exemption regulation, and **around half** of the respondents on this issue (more public than private) specifically **support a broader range** of exemptions (42) or the integration of regional and environmental aid and rescue aid for SMEs (34).

1. Respondents often call for a flexible, simple text with a wide scope or even higher thresholds: for one, a *de minimis* regulation could even be avoided.
2. **The proposal raises many questions within** both private and public sectors, especially on the *modus operandi* between the proposed regulation, the text on *de minimis* aid and the existing regulations. Some respondents express concern about the **risk of over-generalised rules** that cannot be adapted to the specificities of each sector, and the **risk of differing interpretations** between MS, and they question the ability of the Commission to **address the problem of cumulation**.
3. Proposals from all types of respondents include other domains such as: regeneration aid, renewable energy, public transport, activities of social interest, large firms regarding R&D, rural development, start-up aid, employment aid, culture, innovation, risk capital, etc. Some suggest including the agricultural and transport sectors.
4. 1 MS and 1 region insist on keeping the possibility to notify individual cases.
5. The private sector especially stress tightening control and monitoring, increasing transparency in the granting of SA and undertaking an economic analysis before drafting such a text.
6. MS and local authorities (regions and regional development bodies) highlight increasing legal certainty through definitions, examples, and clarity on what is definitely or never compatible. The administrative burden must be reduced.

#### DE MINIMIS AID

*In addition, the threshold under which Member States may grant **de minimis aid** without further specific requirements will be increased to take account of the evolution of the economy.*

1. 63 respondents, mainly from the public sector, dealt with this topic. Quasi-unanimity is found for increasing the threshold; only 3 respondents from all types are hostile to it. However, 12 respondents of all types also **explore alternative systems**, sometimes conditional on amending the cumulation rules. 29 respondents, most of them regions, propose a **substantial increase: 25 support a threshold of between €120,000 and €300,000, 4 suggesting more than €400,000** (up to €1,000,000).
2. 5 respondents, **SMEs representatives** in particular, **question any increase** or ask simply for inflationary rises to be taken into account. For them, a higher threshold would decrease control and penalise SMEs. 1 MS also suggests that the Commission should retain the possibility of excluding certain sectors if competition problems are expected.



3. Respondents both from private and public sectors identify the cumulation issue as one of the main sources of administrative burden. A number of solutions are suggested, such as considering individual projects instead, or reducing the reference period to one year.
4. The private sector highlights increasing control and transparency of the scope of block exemptions and *de minimis* rules. Some (mostly business federations) would prefer using a **LASA (Lesser Amounts of State Aid) mechanism, or placing the emphasis on specific aids** rather than *de minimis* rules.
5. Some respondents propose a second threshold or a fast-track system for specific forms of aid, such as activities mainly undertaken at local level, including for projects corresponding to Community objectives (environment) or even for export to third countries.

#### 4. **A FOCUSED REGIONAL AID POLICY**

*As was clearly expressed in its Communication to the Spring European Council, the Commission is fully committed to sustainable development and to modernising and advancing Europe's social model. This commitment also applies to state aid policy.*

*In this context, cohesion in particular is an important element of the Lisbon strategy: reducing disparities between the regions of Europe is a factor of stability and a tremendous growth potential. Past enlargements have shown that there is scope for win-win development between richer and poorer regions. State aid policy can contribute to such a positive outcome, by preventing a damaging subsidy race between regions, and by creating the right incentives for growth and jobs, in the least-developed regions and elsewhere.*

*The Commission's regional aid policy needs to be updated to take account of developments in the seven years since the last guidelines were adopted in 1998, in particular enlargement. The Commission has launched a review of the **Community guidelines on regional aid (or "RAG")**, and has the intention to integrate the **Multisectoral Framework on regional aid for large investment projects**. This review will take account of the Third Cohesion Report, which suggests organising future cohesion policy around three main objectives: a) convergence; b) regional competitiveness and employment; and c) European territorial co-operation. These objectives also underlie the Commission's proposals for the structural fund regulations.*

*Given the necessity to use investment aid to large firms sparingly in order to preserve its effectiveness in promoting overall, long-term competitiveness through a reduction of regional disparities, this type of aid could mainly be concentrated on the least-developed regions.*

*Regional aid must be seen in the context of the possibilities for granting aid for horizontal purposes envisaged in this Communication, in particular for aid measures more directly linked to the pursuit of the Lisbon agenda. It will be necessary to examine whether and to which extent regional bonuses present in current horizontal texts should be maintained.*

*The Commission will also examine what levels of aid can be justified outside the least-developed regions, what the aid differentials should be, what categories of undertaking should benefit and for which categories of aid. All this should give the Member States sufficient flexibility to develop policies at national level to promote regional competitiveness and employment and European territorial cooperation, while meeting the overall objective of "less and better targeted aid".*

**Half of the respondents (69) commented on this topic**, especially regions (19), MS (15), business federations (13), trade unions (7) and regional development bodies (6); many refer to the position papers they provided for a previous consultation specifically on this issue.

1. **23 respondents welcome the new “RAG” proposal**, one is against.
2. Both MS and regions ask for **more room for manoeuvre**. Regions want to be more involved in the process.
3. **20 respondents from all types, mainly from “old” MS** (of which 3 MS and 13 regions), still **disagree with the reform** regarding issues such as regeneration aid, aid outside the least-developed regions, the safety net and “87.3.c” regions. There is thus still disagreement regarding Gross Grant Equivalent (GGE) or Net Grant Equivalent (NGE) as a calculation reference, and the granting of aid to large firms.
4. 16 respondents from different types stress that better account should be taken of **global competition, e.g.** the risk of delocalisation or a situation where competition for the settlement of a foreign company is not between EU regions, but between an EU and a non-EU location.
5. 8 stakeholders from less-favoured **regions ask for their specificities to be taken better into account**, e.g. through calculation methods and indicators (such as unemployment rate, peripherality, technological gap, difference in tax level).
6. 7 respondents (incl. 4 regions) call for **better coordination between DG COMP and DG REGIO, and between State Aid, Structural Funds and Cohesion Policy**.
7. 16 respondents (mainly regions and regional development bodies) explicitly support the focus on least-developed regions, while 8 (mainly trade unions) are explicitly opposed to it.
8. 4 stakeholders explicitly criticise regional aid reform as a **risk of limiting this tool an aid to SMEs**; other support this focus.
9. 6 stakeholders explicitly stress the importance of a regeneration policy for urban areas.
10. 7 stakeholders specifically want the bonus system to be maintained, although some draw attention to its complexity.

## **5. OTHER PROPOSALS**

### **RISK CAPITAL**

*Urgent action is needed 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. To facilitate the rapid start-up of new enterprises, the Commission will review the **Communication on risk capital**. The aim of the review will be to contribute to a culture of entrepreneurship and further stimulate 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. In particular, the Commission will focus on the need to further increase the flexibility of the rules to take into account diversity, especially as regards the level of the safe-harbour investment tranches for which the so-called 'equity gap' is presumed to exist.*

- A quarter of the respondents (41), mostly from the public sector, commented on this topic, among them 14 MS, 9 regions, 9 business federations and 5 regional development bodies.
- **The review is generally supported**, especially by public authorities at all levels.
- 19 respondents, incl. 5 regions, 5 MS and 5 business federations, **support the new provisions on start-ups**. One respondent **asks that not all types of start-ups be covered** by the text, while, by contrast, another asks for all types of SMEs to be included.
- 2 respondents stress that R&D and risk capital texts should be reviewed together at the same time.
- **Special treatment** is required **for social economy and cooperatives (by its representatives), for less-favoured regions (by regions or regional development bodies), or for new MS**.
- **Flexibility** and the scope of the text should be increased. More particularly, **thresholds should be increased, and take account of Basle II, as called for by 6 respondents, mostly MS and regions**. 2 respondents state that the text should **not focus only on initial investment**, but also on further investment needs. It is also suggested its scope be extended to other forms of investment.
- 2 MS ask for a calculation method of the equivalent in subsidies of aid in risk capital.

## HUMAN CAPITAL

*The achievement of a high level of employment, sustainable growth and economic and social cohesion are key objectives of the Community. The European Employment Strategy (EES), which is a cornerstone of the revised Lisbon Strategy, promotes a high level of employment together with a skilled, trained and adaptable workforce. This requires a substantial investment in human capital. In this context, state aid could be justified when it is necessary to provide the right incentive 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. Furthermore, strengthening the adaptability and upgrading skills of workers and enterprises overall, and improving the quality of education and training provisions are a key to improve the capacity of the EU to anticipate, trigger and absorb economic change of an ever accelerating pace.*

*The block exemption regulations for training and employment aids both expire at the end of 2006. The Commission intends to simplify and consolidate these block exemptions in the context of a general block exemption regulation, taking account of the principles set out above.*

- **A quarter of the respondents** (e.g. 32 in total, among them 9 MS, 7 regions, 5 business federations, 5 trade unions and 4 regional development bodies) expressed views on this issue.
- They are quasi-unanimous in underlining the **usefulness of these texts** and **support their inclusion** in the general regulation, which would make the texts more efficient.
- Respondents generally call for a wider scope of the text, through simplification of the rules, (e.g. adapting to national systems, or regarding limits, deadlines and categories) and **higher thresholds**.
- **The respective representatives demand a better focus on disabled workers, less-favoured regions and social undertakings and cooperatives.**

## ENVIRONMENT

*Environmental protection is in itself essential. It can also be a source of competitive advantage for Europe, by providing opportunities for innovation, new markets and increased competitiveness through resource efficiency and investment.*

*The **Community guidelines on state aid for environmental protection** are applicable until 2007. In 2005, the Commission will start reflecting on ways and means to better address the challenges and opportunities that sustainable development creates, as set out in the Lisbon and Sustainable Development Strategies, especially with the aim of ensuring a full internalisation of environmental costs. In particular, the Commission will attempt to encourage eco-innovation and improvements in productivity through eco-efficiency in line with the Environmental Technologies Action Plan (ETAP). Certain measures might also be exempted under the general block exemption from the obligation to notify the aid.*

- 42 answers were made on this topic, **mainly from direct stakeholders, and especially from the public sector** that comes face to face with those issues on a daily basis: 11 are from business federations and 2 from companies, 10 from MS, 8 from the regions, and 6 from regional development bodies.
- 29 respondents explicitly welcome the review and make a large number of suggestions.
- 11 respondents (among them 4 MS, 2 regions and 3 business federations) explicitly **support block exemptions**. Some note that in this domain most forms of State aid do not significantly distort competition. However, guidelines should in any case be maintained to avoid loopholes.
- Some respondents ask for a special **treatment in favour of SMEs or regional differentiation**. It is suggested that environmental provisions be included in State aid regulations on SMEs, regions, innovation and R&D.
- For MS, regions and regional development bodies, the guidelines should provide **more incentives**, more **flexibility**, encourage modal shift and renewable energy, and **increase eligible costs**. They should **allow for a more pro-active policy** on the part of MS and local authorities.

- For MS, regions and regional development bodies, and to ensure **legal certainty**, the **calculation method and the notification procedure should be simplified**, and a **vade-mecum** drawn up explaining the regulations and giving examples.
- 2 private stakeholders underline the **practical difficulty of fully internalising environmental costs** in some cases.
- Respondents from all types suggest many practical and detailed proposals, including measures regarding issues such as: renewable energies, operating aid for energy and resource saving, climate protection, modal shift in transport, biological agriculture, fight against urban spread, reduced emissions of greenhouse gases, better use of natural resources, reduced landfill, emissions trading and the preparation of national allocation plans, investments above environmental norms, aid for environmental measures outside any norms, aid when it is possible to demonstrate the “polluter pays” principle, aid for SMEs, aid for eco-innovation, aid for cleansing of the ground, aids for measures aimed at limiting pollution of the environment or the danger for inhabited zones, waste management, reduction and recycling.

#### TRANSPORT AND ENERGY AND INFORMATION AND COMMUNICATION TECHNOLOGY INFRASTRUCTURE

*The Lisbon Action Plan stresses that modern transport, energy and information and communication technology infrastructures throughout the EU territory are a prerequisite for reaping the benefits of a re-invigorated Lisbon Strategy. It therefore invites Member States to fulfil their commitments in terms of investments for Transport and Energy Networks. Member States increasingly rely on Public Private Partnerships to build infrastructures. It is thus important that state aid rules are clear for the assessment of public resources involved in Public Private Partnerships. More generally, as a consequence of the recent opening of formerly state-controlled markets, public bodies are increasingly involved in a number of markets. This may raise legal issues regarding the applicability of state aid rules. The Commission will consider the need to issue guidance in those matters.*

- Of the 42 answers received on this topic, 13 were from MS, 9 from regions, 11 from the business sector (federations and companies) and 5 from trade unions.
- Clearer rules are required by many respondents, e.g. on calculating the amount of public resources in PPP.
- A better link with sectoral texts on State aid and with regional or environmental policies is required.
- The administrative burden should be reduced for both public and private sectors.
- Flexibility is required in order to encourage infrastructure building; 2 respondents (one public, one private) suggest that when a tender is launched, it is considered that there is no SA. The procedure should be simplified regarding projects that are part of the Trans-European Network systems. More derogations should be created.

- A few public authorities (MS and regions) call for an extension of the scope of the text to other fields, such as public utilities in general or New Information and Communication Technologies.
- 1 MS and 5 trade unions oppose applying SA rules to public infrastructure, because they fear it might prevent new infrastructure from being built due to heavy constraints.
- 2 business federations, 1 company and 1 MS underline **the persistence of discrimination against private entities** in those sectors.

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

94 respondents of all types commented on the practises and procedures of State aid, **41** of them from the public sector, **45** from the private sector and 8 of public-private nature.

The topics most commented on are as follows (in decreasing order):

- improvement of internal practices and administration, and best practice guidelines;
- proposal for amendment to Council Regulation (EC) No 659/1999 (procedural regulation);
- idea of creating independent authorities in MS;
- promotion of advocacy, awareness and understanding of State aid control at all levels.

The subjects least commented on are as follows (in decreasing order):

- enforcement and recovery;
- greater role of national judges;
- enlargement of the scope of Council Regulation No 994/98 enabling the Commission to block-exempt additional types of measures, e.g. aid for culture and heritage conservation;
- establishment of a network of State aid authorities or contact points;

##### **1. WITHIN THE SCOPE OF THE CURRENT PROCEDURAL REGULATIONS**

*Currently, there are certain **shortcomings in the practices and procedures** of state aid policy, which can be observed in the long time frame for the treatment of cases. To a certain extent the reason for this delay is to be found in the many obligatory requirements in the Council procedural regulation N° 659/1999 (ex: linguistic coverage and publication requirements), and if no action is taken this time frame is even likely to increase due to*

*enlargement. Longer time frames are clearly an unacceptable outcome, bearing in mind that a trade off might exist between the duration of the procedure and ensuring an effective control while safeguarding the rights of third parties.*

*Where possible **within the scope of the current procedural regulations**, the Commission will in the short term improve its internal practice and administration, and increase efficiency, enforcement and monitoring. Since the success will depend on the practices in Member States too, they should also make an effort to improve their efficiency, transparency and implementation of state aid policy.*

*The Commission will consider issuing best **practices guidelines** after consulting Member States as well as the public on how procedures could be improved to better administrate state aid control. It will notably try to instil more predictable timelines; clear intermediary steps in the procedure and ensure higher transparency by providing more information on Internet. The Commission will also reduce delays by encouraging a higher quality of notifications and by discouraging incomplete notifications by a more systematic use of the information injunction, requesting Member States to provide complete information within a certain period.*

Generally, the respondents **agree** with Commission's proposals concerning the improvement of practice and administration, and best practice guidelines.

**66** respondents submitted comments concerning this issue, **39** of them from the private sector, **26** from the public sector and **7** regional development bodies of a public-private nature.

Respondents welcome the Commission's proposals and encourage the Commission to go down this route. The principal recommendations are as follows:

1. **56** respondents welcome the Commission's proposal to improve practice and administration. Nevertheless, **7** of them (**4** MS, **1** region, **1** business association and **1** company) say that the **improvement** of practice and administration should **not be unidirectional** and be at the expense of the MS only and that the improved role of the MS also depends on the clarity of the rules set by the Commission (necessity to make it clearer in the required information for a notification). A review of the Commission's internal procedures is certainly also an element of procedural reform.
2. Change of **linguistic requirements**: Only **3** respondents (**2** law firms and **1** MS) are in favour of the change. Some respondents, in particular **4** MS and **3** regions, express concern about the reduction of languages to English and French. Linguistic changes may not lead to translations in French and English only.
3. The proposal for the supply of **information on the internet** is welcomed by **36** respondents. **1** law association and **1** business association air the view that it is important for other improvements to be made as part of the amendments to the procedural rules.  
**1** business association proposes creating a system for monitoring the progress of the procedure within the Commission by way of an internet connection reserved for the beneficiary enterprise. **3** respondents (**1** MS, **1** law association and **1** institution) suggest that the Commission could publish completed notifications together with its decisions.  
Another law association asks for an improvement of DG Comp's website in terms of clarity, ease of navigation, and effectiveness of the search engine.

4. The Commission's willingness to establish **more predictable timelines** is welcomed by all respondents commenting on this topic (38). However, 6 respondents (3 business associations, 1 MS, 1 law firm and 1 law association) question whether guidelines are enough and call for an amendment to the procedural regulation.
5. The proposal to issue **best practice guidelines** is welcomed by 50 respondents. A few of them treat the concept of "best practice guidelines" with caution: these must not become the standard against which the practices in each MS, let alone each State aid case, are measured. The situation in the MS is too divergent to allow experience simply to be transferred from one MS into the system of another MS.

## **2. PROPOSAL FOR AMENDMENT OF COUNCIL REGULATION (EC) No 659/1999**

*The Commission will examine all possible actions to lower administrative costs and improve the procedural rules with a particular aim to reduce the time period for treatment of cases in which the Commission has opened procedure; to provide a clear incentive to comply with the obligation to notify aid measures and to achieve an enhanced efficiency, monitoring and enforcement. In this context, the Commission intends to present a consultation document in 2007 which will be discussed with Member States, and could lead to a **proposal for amendment of Council Regulation No 659/1999 (procedural Regulation)**.*

59 respondents of all types commented on this topic (16 MS, 10 regions, 12 business associations, 7 law firms, 5 social partners, 2 institutions, 2 academic institutions, 2 companies, 2 regional development bodies and 1 non-business association). 30 respondents come from the public sector, 27 from the private sector and 2 respondents are regional development bodies of a public-private nature. They all agree with the proposal to amend the procedural regulation.

Many respondents make specific proposals for amending the procedural Regulation. Some respondents propose taking the mechanisms of the EC Merger Regulation as a model for amending the procedural Regulation.

Some of the respondents suggest that the Commission should adopt a more aggressive timetable (proposal to be adopted in 2006 so that the Council is likely to adopt the amendments by not later than 2007).

The different options proposed by the Commission in the SAAP were:

*. To save time and increase transparency, the Commission could increase the use of the internet; the Commission could also commit to conclude its investigation in shorter time-frame, provided Member States ensure good co-operation, that procedures be opened in case of doubts, and that negative decisions could be adopted if all relevant information has not been*



*submitted before a certain deadline. In addition, administrative procedures and linguistic issues such as translation requirements could be reviewed.*

*. To ensure that aid measures are duly notified, the scope of the recovery injunction could be expanded to invoke a systematic transitory recovery of non-notified aid and some sort of deterrence mechanism on Member States could be introduced for measures which have not been notified. For instance, periodical reviews of the track records of Member States in terms of notification could be implemented. Where it appears that a Member State fails in notifying properly its state aid, the Commission could pursue the non-compliance under Articles 226 and 228 of the Treaty to seek penalties.*

*. To achieve greater efficiency, the discussion and design of appropriate measures could be formalised more precisely. Also, the Commission could enhance the consultation of market participants and the gathering of relevant sectoral information through new instruments granting additional investigative powers. A written procedure for the Advisory Committee on state aid could also be foreseen.*

1. Increasing **use of the internet**: **14** respondents (5 MS, 5 law firms, 2 business associations and 1 institution) commented on this topic and all agree (but see comments above).
2. **Shorter time-frame**: this point is widely commented on by **28** respondents: 8 MS, 6 law firms, 6 business associations, 4 regions, 2 regional development bodies, 1 institution, and 1 non-business association. All of them welcome the Commission's proposal of committing itself to concluding its investigation in shorter a time-frame and they all agree that strict and shorter procedural deadlines could be mentioned in the procedural Regulation. Many respondents make concrete proposals on this subject.
3. The **review of administrative procedures**: **18** respondents (5 MS, 5 law firms, 4 business associations, 2 regions and 2 regional development bodies) mention this subject; all of them agree with the Commission and are in favour of this review, but they do not make any suggestions.
4. **Review of the linguistic issue** (translation requirements): **10** respondents commented on this topic (6 MS and 4 regions). **1** Member State is in favour of a review of the linguistic issue (the UK) and **5** MS (Germany, France, Greece, Italy, Poland) and **4** regions (3 German regions and the assembly of European regions) fear that linguistic changes would lead to translations in French and English only.
5. **Systematic transitory recovery** of non-notified aid: **23** respondents commented on this subject. **3** respondents, all from the private sector (3 law firms), support this proposal but **20** respondents, mainly from the public sector (7 MS, 6 regions, 5 social partners, 1 business federation and 1 company) are opposed to it.
6. The settlement of a **deterrence mechanism on MS** (in pursuit of non-compliance under Articles 226 and 228 of the Treaty to seek penalties): **10** respondents commented at length on this topic. **8** respondents (4 law firms, 2 Member States and 2 business associations) are in favour of imposing a financial penalty on MS for granting illegal aid and breaching the notification procedure.

2 respondents (1 Member State and 1 company) are against the adoption of such a measure.

7. Granting **additional investigative powers** to the Commission: **8** respondents commented on this point. **7** respondents (5 business associations, 1 institution, and 1 law firm) disagree with this proposal while **1** Member State is in favour of it. These 8 respondents often raise the issue that if additional investigative powers are granted, the aim should be to carry out an economic and competition analysis of the relevant measure (otherwise more details are needed).

These 16 respondents (the majority from the private sector) commented on a subject, which was not mentioned in the SAAP: the need to **increase rights for the beneficiaries of aid and other third parties**. Respondents note that an increase of such rights will improve legal certainty and will contribute to the quality of the notifications. Many of them make specific proposals for enhancing beneficiaries and third parties' rights. Almost **19%** (3) are from the public sector (2 MS and 1 academic institution) and **81%** (13) from the private sector (6 law firms, 6 business associations and 1 company).

### 3. INDEPENDENT AUTHORITIES IN THE MEMBER STATES

*While the Commission has the competence to adopt detailed state aid rules, the successful implementation of the rules and procedures depends to a large extent on Member States. In the context of enlargement, the screening of state aid measures was conducted by operationally independent monitoring authorities in the new Member States. This has been a valuable experience which should be taken into account when considering further cooperation between the Commission and all Member States. In this context, the Commission will examine whether **independent authorities** in Member States could play a role as regards facilitating the task of the Commission in terms of state aid enforcement (detection and provisional recovery of illegal aid, execution of recovery decisions).*

This proposal had **the highest disapproval level** of all the proposals for modernising State aid practices and procedures. It was commented on by **52** respondents. The respondents who commented on the proposal are from all types: MS (15), regions (8), business associations (14), law firms (6), institutions (3), regional development bodies (3), companies (2) and non-business associations (1).

**15 respondents** (6 business associations, 5 MS, 2 law firms, 1 region and 1 non-business association) **confirm their support** for the proposal while **28 respondents** (8 MS, 7 regions, 3 law firms, 2 institutions, 6 business associations, 1 company and 1 mixed entity) **question it**. In general, the private sector is in favour of independent national authorities, but it often calls for more details or clarification; the public sector, on the contrary, disagrees with the idea of creating independent national authorities.

The principal obstacles mentioned by the 28 respondents who question the proposal are as follows:

1. The **independence** of such national authorities: there might be a conflict of interest (the State controls the State); political and public pressure against national surveillance authorities might be high.
2. This measure could **increase bureaucracy** and slow down procedures.
3. There is a risk of implementation standards varying from one MS to another because national authorities could monitor with differing levels of rigour, leading to **uneven application** of State aid controls.
4. There is a general concern about the legality and operation ability of a full **delegation** of responsibility to independent authorities in MS. The final responsibility should remain with the EC in order to avoid any legal uncertainty.
5. Creating such authorities would be at variance with the **principle of the institutional autonomy** of the MS.
6. **Comparison** with the **experience of accession MS**: this experience was different; it was limited in time and scope.

The question of creating independent national authorities raises **numerous questions** about their role, their composition and their powers. Are they to be new authorities or existing bodies? How would they share their power with national judges? Therefore, if the Commission decides to press on with the idea of creating independent national authorities, some respondents propose that the Commission should issue a **specific document** providing more **clarity** and a **global picture** of the powers and obligations of such authorities.

#### **4. PROMOTE ADVOCACY, AWARENESS AND UNDERSTANDING OF STATE AID CONTROL AT ALL LEVELS**

*The Commission will promote advocacy, awareness and understanding of state aid control at all levels to help the granting authorities in designing measures that are compatible with the treaty rules.*

*The Commission will step up its **monitoring of the compliance** by Member States of conditions laid down in state aid decisions, including the respect of the provisions of the block exemption regulations. It will also encourage Member States to engage in benchmarking to verify that state aid is achieving the objective and is the best type of state intervention for any given objective. This could be done in partnership with national Courts of Auditors.*

*The Commission will also engage in **advocacy** to encourage stakeholders to ensure that the rules of state aid are fully respected. Article 88 (3) EC has direct effect and gives national judges the power to suspend and provisionally recover aid granted illegally before its approval by the Commission. Private litigation in front of national courts could therefore provide increased discipline in the field of state aid. The awareness of company auditors, national market regulators and national Courts of Auditors could also be reinforced. To this effect, the Commission has launched a study focusing on two main aspects of enforcement of state aid law at national level; namely the role of national courts in the protection of rights conferred upon interested parties, notably competitors of the beneficiaries of unlawful aid, and the enforcement at national level of negative decisions, in particular those with recovery obligation.*

The proposal to promote advocacy, awareness and understanding of State aid control were commented on by **47** respondents, 22 respondents from the private sector, 20 from the public sector and 4 of a public-private nature. There were: 11 MS, 11 business associations, 7 law firms, 5 regions, 4 mixed entities, 3 institutions, 3 companies, 2 non-business associations and 1 social partner.

The level of support varies in relation to specific subjects but a more negative approach can be observed mainly among MS and regional institution (which were against any shift of responsibility from the Commission to MS). At the same time, the business environment and law firms are generally supportive.

The following observations can be made:

1. **Monitoring of compliance by MS with the conditions laid down in State aid decisions** is supported by 16 respondents coming mainly from the private sector (6 business associations, 4 law firms, 2 regional development bodies, 1 company, 1 non-business association, 1 MS and 1 region) while 4 respondents, all from the public sector (2 MS and 2 regions), disagree with it. The comments underline the need to improve transparency and monitor existing block exemptions through stricter reporting obligations on the MS.
2. The response to idea of **encouraging MS to engage in benchmarking to verify that State aid is achieving its objective** is mainly positive. 3 respondents are opposed to this idea but 15 respondents support it. 1/3 is from the public sector (3 MS, 1 institution and 1 region) and almost 2/3 from the private sector (5 business associations, 4 law firms). 1 regional development body also agrees with this proposal. It is suggested that the Commission supports the use (albeit not compulsory) of third party auditors (e.g. independent technical experts or firms of accountants) by aid providers to ensure that aid is limited to the minimum necessary, and that eligible costs are correctly calculated, etc. However, there are also statements that monitoring of the use of public subsidies should be done by governments and national parliaments and that MS must formulate their own enterprise policies, which the Commission should not coordinate.
3. **Private litigation and increased involvement of the national judiciary in the protection of rights conferred upon interested parties** was commented on by 17 respondents. 6 of them disagree with the proposal (4 MS, 1 region and 1 business association) while 11 are in favour (6 business associations, 3 law firms, 1 MS and 1 region). This topic drew the biggest number of comments:
  - i. The idea should be viewed with caution as it would require time and resources from the judiciary, and need specialised judges or a specific entity in each MS.
  - ii. Concerns about the uncertainties regarding the available remedies under domestic legal systems and lack of transparency regarding local procedural rules.
  - iii. Need to improve and harmonise national courts proceedings in relation to State aids within the EU.

- iv. Decentralisation can only be done on condition of being applied uniformly.
  - v. Existence of a risk of private actions to challenge government decisions. The system can also be used by disgruntled operators, who have failed to receive aid through a competitive process, to disrupt awards to successful applicants.
  - vi. The Commission should examine ways to allow competitors established in one MS to sue the public authority of another MS in their domestic courts.
  - vii. National litigation should be possible only within a clearly identified time-limit: once the time-limit has expired there should be no further possibility of challenging the State aid and hence all partners in the project can fully rely on its legitimacy.
  - viii. The Commission should adopt a "Remedies Directive", to provide harmonised remedies, including injunctive relief and damages, in MS courts in cases of non-notified State aid.
4. **Enforcement at national level of negative decisions (recovery obligation)** is welcomed by 13 respondents, the majority of them from the private sector (6 business associations, 5 law firms, 1 MS and 1 region). However, there is also quite serious concern that national authorities would not have the incentive to recover aid unless a system of penalties was applied. 5 respondents, almost all of them from the public sector, are opposed to the proposal (3 MS, 1 region and 1 business association)

## 5. PROPER ENFORCEMENT

*The effectiveness and credibility of state aid control presupposes a proper enforcement of the Commission's decisions, especially as regards the recovery of illegal and incompatible state aid. The Commission proposed therefore to achieve a more immediate and effective execution of recovery decisions. Recent experience has shown that the implementation of recovery decisions by Member States is not satisfactory and, moreover, that conditional or positive decisions are sometimes not correctly implemented by the Member States. The Commission will therefore 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.*

The vast majority **welcomed** these proposals. 33 respondents commented on this topic: 10 MS, 7 business associations, 6 law firms, 4 regional development bodies, 4 regions, 1 company and 1 non-business association. 15 respondents are from the private sector, 14 from the public sector and 4 respondents are of a public-private nature. The

negative positions are presented by an individual company and one regional organisation.

The principal comments and suggestions are:

1. There is a need to prevent any **conflict of interest** between MS as the aid donor and as the recovering institution.
2. There could be an expanded **enforcement team within DG Competition**, responsible for reviewing the way in which MS follow up negative decisions.
3. The Commission could undertake **periodic reviews** of the extent to which individual MS have complied with recovery decisions. **Infringement proceedings** could be initiated where the evidence indicates that MS are failing to implement decisions.
4. Request for a clearer **link between recovery and the re-establishment of competition**, to ascertain that recovery does not act as a means of ‘punishment’ of the beneficiary but solely as a way of restoring competition.
5. The Commission could **publish**, as part of a State aid scoreboard, details regarding the **progress made in implementing recovery decisions**. This could increase the pressure on MS to take the necessary steps to recover unlawful aid.

## **6. THE ROLE OF THE NATIONAL JUDGES**

*The Commission proposed to increase the role of national judges: one additional area where national judges could play a greater role could be in controlling whether measures deemed to fall under a block exemption or under the de minimis thresholds, and which have therefore not been notified to the Commission, fulfil the necessary criteria. If needed, the Commission will consider reviewing the Notice on cooperation between national courts and the Commission in the state aid field, in particular whether to expand its scope to other national bodies.*

Of the 32 answers given on this issue, 25 also submitted comments. Mainly MS (11), lawyers (6), and business associations (7) interested in this question but also some regions (2), companies (2), regional development bodies (2), one non-business association and one institution.

10 respondents, mostly from the private sector (4 law firms, 3 business associations and 3 MS) explicitly approve the proposal for national judges to control whether measures deemed to fall under a block exemption fulfil the necessary criteria, while 9 respondents, nearly all from the public sector (3 MS, 2 regions, 1 regional development body and 3 business associations), question the proposal.

6 respondents, mainly from the private sector (2 business associations, 2 law firms and 2 MS) agree with the proposal for national judges to control whether measures deemed to fall under the *de minimis* thresholds fulfil the necessary criteria but 6 respondents, nearly all from the public sector (3 MS, 2 regions and 1 business association), are not in favour.

4 respondents (3 law firms or associations and 1 MS) support the proposal to review the Notice on cooperation between national courts and the Commission in State aid, while 1 MS and 1 region disagree.

3 respondents (1 MS, 1 region and 1 law association) explicitly mention their disagreement with the proposal to expand Notice's scope to other national bodies.

The vast majority of respondents treat the idea of decentralisation with at least **caution**, 4 even being opposed to it.

The respondents raise **a series of problems**, regarding the lack of training, time and resources of national courts, the potential lack of independence for some of them, and the risk of jurisdiction conflicts and non-uniform application of EU law, and draw attention to the fact that in matters of control, granting and monitoring of aid, the final responsibility should remain with the Commission in order to avoid any legal uncertainty. Some suggest creating special courts and mechanisms to ensure consistent implementation, giving *locus standi* and *amicus curiae* to the Commission, which should keep the final responsibility for State aid, and harmonising national procedures.

## **7. ENLARGE THE SCOPE OF COUNCIL REGULATION (EC) No 994/98**

*The Commission will evaluate the need to enlarge the scope of Council Regulation No 994/98 enabling the Commission to block exempt additional types of measures, e.g. aid for culture and heritage conservation. In that context, the Commission intends to clarify the roles and uses of block exemptions and guidelines, and will consider the possibility of giving the block exemptions not only a positive effect like the one they already have, but also in certain cases a negative effect. This would mean that some criteria for exemption of notification would also be a criteria for compatibility of aid, which would enable the national jurisdictions to apply block exemptions directly not only by declaring the compatibility by also the incompatibility of certain aid.*

**22** respondents made comments on this topic; mostly from the public sector (9 MS, 2 institutions and 2 regions). **7** are from the private sector (5 business associations, 1 law firm and 1 non-business association) and **2** from regional development bodies of a private-public nature.

**12** respondents explicitly approve the proposal to broaden the scope of Council Regulation No 994/98, as suggested by the Commission. **8** respondents want the Commission to clarify the roles and use of block exemptions and guidelines.

**2** respondents (1 MS and 1 business association) disagree with the proposal to give block exemptions a negative effect and 1 MS and 2 business associations question the legal bases whereby “national jurisdictions apply block exemptions directly not only by declaring the compatibility but also the incompatibility of certain aid”

**3** respondents explicitly support the extension of the scope to culture, while one is opposed to it.

1 Member State highlights the need to clearly define the criteria of Regulation 994/98 so that its practical application is not a problem for Member States. One regional development body mentions the need to maintain certain flexibility so that the Commission can deal with exceptional cases that might have been ruled incompatible when there may have been a good case for State aid.

## 8. ESTABLISHING A NETWORK OF STATE AID AUTHORITIES OR CONTACT POINT

*To ensure a proper enforcement of its decisions, the Commission will request more transparency in the general principles of state aid control and consider establishing a network of state aid authorities or contact points in order to facilitate the flow of information and exchange of best practices.*

Almost 16% of the respondents (21) touched upon this subject in their replies. They are mainly MS and public institutions (9), law firms (4) and business organisations (5). The creation of a State aid network is supported with only one exception (1 MS) stating that a possibility to communicate already exists via CIRCA.

As for comments, the respondents indicate that the network should be a practically focused forum to **exchange information and best practices**, including the possibility of **clarifying how the rules may be applied** and providing State aid training across borders. Publicly known national contact points should ensure the flow of information, including dissemination to the regional level.



## **V. A COMPREHENSIVE REVIEW OF ALL REMAINING DOCUMENTS**

*The Commission has considered the necessity to review every single Commission document related to the granting of state aid. In the last stage of the reform the Commission will aim at reviewing the remaining documents, where necessary, so that the same principles are applied consistently and comprehensively in all state aid instruments.*

**25%** of the respondents commented on at least one proposal presented in that area. They were mainly MS and, for specific points, business federations and other stakeholders in the sectors directly concerned by some of the texts (e.g. cinema, shipbuilding).

The highest number of comments was received on the **review of cinema communication** (and the proposal of extending the block exemption to cinematographic and other audiovisual works): 11 comments, 7 dealing exclusively with this sector. Most respondents are at least cautious on the proposal to change the present system, while 3 are clearly opposed to it. Most respondents seem satisfied with the current system. Respondents also insist on maintaining territorialisation and merging certain categories. At the same time, the comments received in this respect underline the importance of maintaining separate guidelines for the cinema sector and making sure that the block exemption for cinema will not involve the application of a more restrictive approach than the existing guidelines.

The second most commented issues were publication of **the consultation document on State aid in different forms of aid** (general support), the review of the notice on State aid on the form of guarantee (mainly support), the review of the notice on application of the State aid rules to measures related to direct business taxation (mainly comments and demands for clarification) and **maintenance of the framework for State aid to shipbuilding** (mainly support).

Regarding the other topics, respondents generally ask for more details and clarification, and express their willingness to take part to further consultations.

# ANNEX I

## STATISTICS ON THE RESPONDENTS

### I. Per nationality

Origin	Number	Percentage
UK	29	21.64
EU-wide	26	19.40
France	20	14.93
Germany	17	12.69
Belgium	5	3.73
Italy	5	3.7
The Netherlands	5	3.73
Austria	3	2.24
Slovakia	3	2.24
Sweden	3	2.24
Cyprus	2	1.49
Greece	2	1.49
Poland	2	1.49
Spain	2	1.49
Czech Republic	1	0.75
Denmark	1	0.75
Estonia	1	0.75
Finland	1	0.75
Hungary	1	0.75
Luxemburg	1	0.75
Latvia	1	0.75
Slovenia	1	0.75
Norway	1	0.75
USA	1	0.75
<b>TOTAL: 24 origins</b>	<b>134 contributions</b>	<b>100 %</b>

## II. Per type

Type	Number	Percentage
Business federations	35	26.12 %
Regions and regional associations	25	18.65 %
Member States	20	14.93 %
Companies	14	10.45 %
Social Partners	10	7.46 %
Local entities combining public and private stakeholders	9	6.72 %
Law firms and associations	8	5.97 %
Non-business federations	5	3.73 %
Institutions	4	2.99 %
Academic institutions	4	2.99 %
<b>TOTAL</b>	<b>134 contributions</b>	<b>100 %</b>

## III. Per nature

Nature	Number	Percentage
Public entities	59	44.03 %
Public-Private entities	9	6.72%
Private entities	66	49.25 %
<b>TOTAL</b>	<b>134 contributions</b>	<b>100 %</b>

## ANNEX II

### STATISTICS ON THEMES

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Theme	Number of comments
Focusing on key priorities	115
Communication on State aid and innovation.	70
Framework for Research and Development.	70
Communication on risk capital.	41
Investing in human capital.	32
High quality Services of General Economic Interest.	61
General block exemption regulation.	76
<i>De minimis</i> aid.	63
Community guidelines on regional aid (or 'RAG')	69
Encouraging an environmentally sustainable future.	42
Setting up modern transport and energy infrastructure.	42
Modernising the practices and procedures of State aid	94
Within the scope of the current procedural regulations - improving internal practice and administration.	60
Best practice guidelines.	61
Independent authorities in the Member States.	52
Proper enforcement of the Commission's decisions - more immediate and effective execution of recovery decisions.	33
Establishing a network of State aid authorities or contact points.	21
Promoting advocacy, awareness and understanding of State aid control at all levels.	47
National judges	32
Proposal for amendment of Council Regulation (EC) No 659/1999 (procedural Regulation).	59
Enlarging the scope of Council Regulation No 994/98 to enable the Commission to block exempt additional types of measures, e.g. aid for culture and heritage conservation.	22
A comprehensive review of the remaining documents	34

# ANNEX III

## STATISTICS ON THE REPLIES

	support	no comment	oppose	support ratio (% replies)
opinion about the method of using consultation	65	69	0	100%
general support for the reform	99	34	1	98%
Pillar 1: less and better targeted State aid	71	54	9	78%
Pillar 2: refined economic approach	69	57	8	79%
Pillar 3: more effective procedures, better enforcement, higher predictability and enhanced transparency	76	55	3	92%
Pillar 4: shared responsibility between the Commission and Member States	46	82	6	77%
new rules on innovation	53	80	1	96%
innovation aid for SME	24	105	5	66%
Innovation aid for intermediaries	14	120	0	100%
innovation aid for highly-skilled researchers	3	131	0	100%
Review of Framework for R&D	54	80	0	100%
R&D review of public-private partnerships	22	111	1	91%
new R&D rules on sharing of Intellectual Property Rights	12	121	1	85%
new rules on aid for R&D dissemination	6	128	0	100%
Extension to a Framework for R&D and innovation	17	116	1	89%
R&D&I block exemptions	29	103	2	87%
Review of communication on risk capital	34	100	0	100%
New provisions on start-ups /SMEs	19	114	1	90%
Flexibility for risk capital	17	117	0	100%
Opinion on block exemption regulation for training and employment	25	108	1	92%
Integration in a general block exemption regulation	16	118	0	100%
Opinion on upcoming SGEI decision and guidelines	39	90	5	77%
Exemption of notification for small-scale compensations	26	105	3	79%
Hospitals and social housing companies	19	112	3	73%
Transparency directive	5	127	2	43%
Opinion on general block exemption regulation	66	67	1	97%
Setting of “positive” and “negative” priorities	3	127	4	-14%
Broader range of exemptions (SMEs; R&D...)	42	91	1	95%
Integration of regional and environmental SA and rescue aid for SMEs	34	100	0	100%
Issue of cumulation of different forms of aid	6	128	0	100%
Exemption of larger amounts of aid	12	122	0	100%
Greater responsibility for Member States	4	127	3	14%
Increase of <i>de minimis</i> aid threshold	57	74	3	90%

Issue of cumulation of different forms of aid	5	129	-	100%
integration of Multisectoral Framework on regional aid for larger investment projects	10	123	1	82%
focus on least-developed regions	16	111	7	39%
granting aid for horizontal purposes	12	122	-	100%
new proposal 'RAG' (July 2005) on regions outside the least-developed regions	22	111	1	91%
review environment before 2007	29	105	-	100%
full internalisation of environmental costs	3	129	2	20%
eco-innovation	7	127	-	100%
block exemptions for environment	11	122	1	83%
guidance concerning PPP	29	104	1	93%
guidance regarding applicability of SA rules on formerly state-controlled markets	12	116	6	33%
Improvement of internal practice and administration (best practices guidelines)	56	78	-	100%
Change of linguistic requirements	3	124	7	-40%
Change of publication requirements	5	127	2	43%
Efforts of the MS regarding improvement of internal practice and administration	20	111	3	74%
Best practice guidelines	50	81	3	89%
More predictable timelines	39	95	-	100%
Clear intermediary steps	27	107	-	100%
Greater transparency (information on Internet...)	36	98	-	100%
More systematic use of the information injunction	10	121	3	54%
Independent authorities in the Member States	15	91	28	-30%
More immediate and effective execution of recovery decisions	24	109	1	92%
Monitor more closely execution of recovery decisions	20	112	1	86%
More actively pursue non-compliance	15	118	1	88%
Network of State aid authorities or contact points	19	114	1	90%
Monitoring of compliance by Member States with conditions laid down in State aid decisions	16	114	4	60%
Encourage Member States to engage in benchmarking to verify that State aid is achieving the objective	15	116	3	67%
Partnership with national Courts of Auditors	5	123	6	-9%
Role of national courts in the protection of rights conferred upon interested parties	11	117	6	29%
Enforcement at national level of negative decisions (recovery obligation)	13	116	5	44%
Controlling measures deemed to fall under a block exemption	10	115	9	5%
Controlling measures deemed to fall under the <i>de minimis</i> thresholds	6	122	6	0%
Review of the Notice on cooperation between national courts and the Commission in State aid	4	128	2	33%
Expand Notice's scope to other national bodies	-	131	3	-100%

Increase the use of the Internet	14	120	-	100%
Shorter time-frame	28	106	-	100%
Review of administrative procedures	18	116	-	100%
Review of linguistic issue (translation requirements)	1	124	9	-80%
Systematic transitory recovery of non-notified aid	3	111	20	-74%
Deterrence mechanism on MS: pursuing non-compliance under Articles 226 and 228 to seek penalties	8	124	2	60%
New instruments granting additional investigative powers	7	126	1	75%
Written procedure for the Advisory Committee on SA.	-	133	1	-100%
Enlarge the scope of Council Regulation No 994/98	12	122	-	100%
Clarify the roles and uses of block exemptions and guidelines	8	126	-	100%
Giving block exemptions in certain cases a negative effect	2	130	2	0%
National courts able to apply block exemptions by declaring not only the compatibility, but also the incompatibility of certain aid	1	130	3	-50%
Communication on short-term export-credit insurance	2	132	-	100%
Methodology for the calculation of reference and recovery rates.	3	131	-	100%
Review of new rescue and restructuring aid guidelines	4	130	-	100%
Review of Communication on the application of State aid rules to public service broadcasting	4	128	2	33%
Communication on certain legal aspects relating to cinematographic and other audiovisual works (cinema communication)	5	126	3	25%
Block exemption extended to cinema (Enabling Regulation)	3	129	2	20%
Issue a consultation document on the aid element in different forms of aid	8	126	-	100%
be systematically stricter towards certain forms of aid than towards others	1	132	1	0%
Review of notice on State aid in the form of guarantees	6	128	-	100%
Review of notice on the application of State aid rules to measures relating to direct business taxation	3	130	1	50%
Extension of the 'notice on the application of State aid rules to measures relating to direct business taxation' to indirect taxation	2	129	3	-20%
Maintenance of a Framework for State aid to shipbuilding	5	129	-	100%
Review of State aid in the agricultural sector	5	129	-	100%
Evaluation exercise of the comprehensive review of State aid	3	131	-	100%