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DG Competition
State Aid Register
SPA 3, office 6/5
B-1049 Brussels
Belgium

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Ref: State Aid Reform

Dear Madam/Sir,

Kyriakides-Georgopoulos Law firm is one of the most highly rated Greek law firms and has a large multidisciplinary work force, comprising of approximately sixty lawyers and offering legal services and expertise to high profile clients both in Greece and abroad. Our range of practice includes corporate, competition/anti trust, industrial and intellectual property, communications and media law, aviation and maritime law, energy, natural resources and utilities, public sector projects, labour and tax law, internet and e commerce, litigation, alternative dispute resolution and arbitration, mergers and acquisitions, banking and capital markets, real estate development and leasing, agency, distribution and franchising and food and drug regulation.

K&G law firm has followed with great interest the recent initiatives presented by the European Commission as set out in the State Aid Action Plan and wishes to make a positive and useful contribution to the consultation.

State aid rules are addressed to Member States, but it is ultimately the beneficiary or other concerned party that is affected by the application of the rules. In particular it is the beneficiary that bears the risk of assuring that the aid has been duly notified and cleared by the Commission. We strongly believe that effective procedures, better enforcement, higher predictability and enhanced transparency, coupled with a more refined economic approach are necessary for the effective application of the rules. **The modernization of substance and procedures will contribute to more effective compliance and to the full exploitation of the potential for investment and growth.**

K&G law firm thanks the Commission for the opportunity to comment on its Action Plan. The firm believes the Commission's document is clear, concise and reflective of the need for reform. K&G law firm suggests that the Commission addresses the following points.

A. Procedural reforms

As is acknowledged in the Action Plan, there are certain shortcomings in the procedures of state aid policy. We welcome the Commission's initiative to improve its internal practice and administration and to issue best practices guidelines.

We particularly welcome procedural reforms aiming to ***consolidate legislation*** to provide a single simpler framework e.g. through the adoption of a single block exemption regulation. We also note that the monitoring provisions of the existing block exemptions could merit some improvement. For instance the reporting obligations of the Member States should be reinforced. It would also be welcome to ***extend monitoring obligations to individual aid granted under exempted schemes***. This would allow not only the Commission, but other interested parties to verify the correct implementation of the individual or scheme aid.

There is also an ***increased need for transparency***, especially at a time when competitors are increasingly using their power to take action against illegal aid either through complaints or through private action before national courts. This would be expected to further increase as the Commission encourages private litigation in front of national courts and intends to reinforce the role of national market regulators and national Courts of Auditors. The increased transparency is necessary both for recipients and competitors who suffer the effects of illegal aid and could be achieved through:

- **Publication of all State aid notifications:** the notification could be published in a short form, as is the case with merger control cases. Even though the majority of decisions are taken within the two month preliminary assessment procedure, there are cases where the Commission opens an in depth investigation. The input of third parties could be useful for the adoption or not of a decision to open the procedure. Furthermore, complete exercise of the potential beneficiary's rights of defense, implies a right to be informed that the Commission intends to open the procedure and to have the opportunity to comment. There are cases where the beneficiaries are informed of the opening of the procedure after the decision has been published or because they have been contacted by the authority intending to grant the aid.
- **Third party access** to the Commission file during the investigation: interested parties establishing a lawful interest should have the opportunity to examine non confidential versions of the submissions and the reports. Third parties should be able to respond and possibly rectify the information provided by the Member State. This would encourage a three-way dialogue between the Commission, the Member states and the stakeholders before the decision has been adopted.

In addition, we welcome the Commission's intention to **shorten the time frame** for the treatment of cases. Time consuming translation requirements as well as the vast amount of obligatory notification requirements could be reviewed and a **more systematic use of the information injunction** to discourage incomplete notifications should be made.

B. Substantial reform

The evaluation of the distortions to competition and trade associated with state aid measures requires a more refined economic approach which would increase legal certainty and predictability. We present our comments in specific areas which we consider are in need of a clearer approach.

1. Selectivity

The rules on state aid impose stricter limits on more selective aid. However **the limits imposed do not necessarily reflect the extent of competition distortion caused by the selectivity**. For example, many of the additional limits are in the form of ceilings on the amount of aid that can be offered, without sufficiently establishing a link between the distorting nature of the aid and the permissible level of aid. These ceilings, in the form of absolute values or relative to the size of the investment being made, are only a rough way of preventing levels of subsidy that significantly distort competition. We would encourage a sound assessment of the distortionary effect prior to setting the ceilings as well as a consideration of the effect of the aid on the beneficiary's costs and not only relatively to the cost of the project.

2. Market characteristics

The distortionary effect of the aid has to be examined in the context of the affected market. The rescue and restructuring guidelines, the Sectoral guidelines and the Multisectoral framework in regional aid for large investment projects consider the effect of the aid on the market, but the **focus** is rather on overcapacity rather than market concentration and the degree of product differentiation. Moreover definition of the market and assessment of the beneficiaries' role is not generally required. We would encourage **the inclusion of market definition and the examination of the role of beneficiaries for a larger proportion of the subsidies**.

3. Market investor principle

The principle, as developed by the Commission and the Courts, involves the assessment of the behavior of a hypothetical market investor. However what is more important is the **context in which the investment is made**, since the existence of financial support may have no distortionary effect on competition. Moreover the test necessarily involves a degree of "psychology" which can give rise to interpretation to the detriment of legal certainty and clarity. Recent Court decisions (such as West LB and Chronopost) point towards a more concrete approach and we would welcome more guidance on the application of the principle as well as the consideration of other economic criteria such as the return on investment test.

4. Recovery of illegal aid

The recovery of unlawful and incompatible aid aims to restore competition in the market affected. We would welcome a **clearer establishment of the link between recovery and the re-establishment of competition**, to ascertain that recovery doesn't function as a means of

“punishment’ of the beneficiary but solely as a way to restore competition to the situation prior to the granting of the aid. In addition in certain cases the Member State or other public authority is both the donor of the aid as well as the recovering institution and we would encourage safeguards to be put in place to avoid conflicts of interest. Finally, although recovery is carried out according to national procedures, we believe the Commission can play a substantial **supervisory role and initiate the non compliance proceedings under Articles 88 (2) if necessary.**

5. Services of General Economic Interest

The wide margin of discretion enjoyed by the Member States in the financing of the provision of services of general economic interest means that there is an increased need for scrutiny of the subsidies awarded, so as to avoid overcompensation and undue distortions of competition. We would encourage the **incorporation of safeguards to eliminate all risks of over-compensation**, which leads to cross subsidization from public service to competitive markets. For example, in the draft framework on SGEIs over-compensation is allowed on the basis of the market investor principle, a principle which is based on a notional investor willing to invest, whereas the logic of SGEIs is based on market failure. In this context we welcome the publication of the guidelines and the Transparency Directive, which will take account of the developments of the Court’s practice.
