Draft Communication from the Commission

A new framework for the assessment of lesser amounts of State aid

1. **Introduction**

1. Article 3g of the EC Treaty provides that the activities of the Community shall include ‘a system ensuring that competition in the internal market is not distorted'. The maintenance of a strong and effective control to ensure that aid granted by Member States does not distort competition is an essential part of that system.

2. The need for effective State aid control has been recognised by successive European Councils. In its conclusions of 24 March 2001, the Stockholm European Council indicated that “the level of state aids in the European Union must be reduced and the system made more transparent…. To that effect, Member States should demonstrate a downward trend in State aid in relation to GDP by 2003, taking into account the need to redirect aid toward horizontal objectives of common interest, including cohesion objectives.”. At Barcelona, on 16 March 2002, the European Council renewed “its call to Member States to reduce the overall level of State aid as a percentage of GDP by 2003, and onwards, and to redirect such aid towards horizontal objectives of common interest, including economic and social cohesion, and target it to identified market failures. Less and better-targeted State aid is a key part of effective competition.”

3. Successive editions of the State aid scoreboard have described in some detail how Member States have given effect to the Stockholm conclusions. The most recent edition of the scoreboard covers the trend in aid levels up to the end of 2001. This shows that the overall volume of State aid, as a percentage of GDP has continued to decline in 2001, although less sharply than in previous years. In 2001, the total amount of aid granted was € 86 billion, or just slightly below 1% of GDP, compared with € 102 billion in 1997. Outside of the specific problem areas of agriculture, fisheries and transport (in particular the railways), the decline in aid levels has been even more notable. In GDP terms, the overall level of aid has declined from 0.58% of GDP in 1997/99 to 0.43% of GDP in 1999/2001, a fall of over 25%. Moreover there has been a significant increase in the proportion of aid devoted to horizontal objectives, such as R&D aid, aid for SMEs, the environment, employment and training, and a corresponding reduction in the amount of more distortive individual aid.

4. Meeting in Lisbon on 23-24 March 2000, the European Council agreed a new strategic goal for the European Union “in order to strengthen employment, economic reform and social cohesion as part of a knowledge based economy” so that the Union would become “the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion” by the end of the decade. The Lisbon conclusions emphasised that “achieving the new strategic goal will rely primarily on the private sector, as well as on public-private partnerships. It will depend on mobilising the resources available on the markets, as well as on efforts by Member States. The Union's role is to act as a catalyst in this process, by establishing an effective framework for mobilising all available resources for the transition to the knowledge-based economy and by adding its own contribution to this effort under existing Community policies while respecting Agenda 2000.”
5. At the Gothenburg European Council, in June 2001 agreement was reached on a strategy for sustainable development and an environmental dimension was added to the Lisbon process for employment, economic reform and social cohesion. Four priority areas were identified: climate change, transport, public health and natural resources.

6. Many of the measures being adopted by Member States to implement the Lisbon process do not give rise to State aid implications because they consist of structural reforms or other general measures which do not confer a specific advantage on certain undertakings or the production of certain goods. Other measures which provide for State resources to be used in support of certain types of undertakings such as SMEs or recently created companies will however fall within the definition of State aid provided for by Article 87(1) of the EC Treaty.¹

7. The current Commission Regulations and frameworks governing State aid already allow Member States a large number of possibilities to grant aid in pursuit of the realisation of Community objectives. In accordance with the de minimis regulation², support of up to €100 000 per enterprise over three years is not considered to constitute aid, except in the sensitive sectors of agriculture fisheries and transport. Greater amounts of aid for SMEs, for training and for employment may be granted without prior notification to the Commission in accordance with the conditions set out in the relevant Regulations³. A further exemption for research and development aid for SMEs is also in preparation⁴. Other aid for R&D, regional aid and environmental aid as well as aid to encourage the provision of risk capital may be approved by the Commission following notification to the Commission in accordance with Article 88(3) of the EC Treaty in accordance with the provisions set out in the relevant Commission guidelines or communications⁵.

8. Notwithstanding the possibilities allowed by these different texts, the Commission recognises that there is scope for further flexibility for the approval of smaller amounts of State aid. In particular the existence of a series of different texts for the assessment of aid, which have been developed at different times may make it difficult to design and administer, aid schemes that would contribute directly to Community objectives.

9. Moreover, the majority of existing aid texts are based on the principle that aid is authorised up to a ‘grant equivalent’ of a fixed percentage of the beneficiaries’ eligible costs. These eligible costs are principally fixed investments in land, buildings, equipment or intangible assets, labour costs, training costs or the costs of consultancy services. As the Commission has already recognised in the communication on risk capital, certain types of support cannot always be found compatible with these rules, either because of the

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¹ See, for example, Joined Cases T-92/00 and T-103/00 Álava and Ramondín v Commission [2002] ECR II-1385, paragraphs 39 to 41 and 48 to 51.
⁴ [OJ reference to be completed]
difficulty of establishing a grant equivalent or because of the difficulty in establishing a
link with eligible expenses.

2. Key elements of the new approach

10. In view of the general considerations set out above, the objective of the present
framework is to introduce a greater degree of flexibility as regards the assessment of
lesser amounts of State aid (hereafter referred to as “LASA”) granted in relation to
Community objectives, without undermining the principle of a strict overall control of
State aid. In order to benefit from this new approach, it will be the responsibility of the
Member States to demonstrate that the aid contributes directly towards the achievement of
horizontal objectives of Community interest and that the necessary safeguards are put in
place to eliminate any potential risks of a significant distortion of the conditions of
competition in the internal market, taking account not only of individual aid awards, but
also of the potential cumulative effect of multiple aid awards. This should allow Member
States greater flexibility to design and implement aid measures which are adapted to local
conditions. It should also enable the Commission to transfer resources from the
assessment of relatively minor cases towards more important cases which may produce
major distortions of competition. Accordingly the Commission considers that over time,
the implementation of the more flexible approach set out in this communication should
contribute to the common interest of developing a more effective and efficient system of
State aid control, focussed on measures which produce significant economic effects at the
Community level.

11. Both the theoretical consideration of the negative externalities caused by aid measures and
internal analyses of past State aid cases undertaken by the Commission indicate that the
amount of aid is an important criterion for distinguishing between cases that present a
serious threat to competition at Community level, and cases that do not. The principle that
small amounts of State aid are likely to have a more limited effect on competition and/or
trade between Member States is not new. Commission Regulation (EC) No 69/2001 of 12
January 2001 on the application of Articles 87 and 88 of the EC Treaty to
\textit{de minimis} aid
already provides that aid “not exceeding a ceiling of € 100,000 over any period of three
years does not affect trade between Member States and/or does not distort or threaten to
distort competition…”.

12. During the preparation of this framework, the Commission has considered the possibility
of raising the \textit{de minimis} ceiling, perhaps substantially. However, it has concluded that
this would not be appropriate, both from the legal and the economic point of view. From
the legal point of view, it has to be recognised that the concept of State aid in the EC
Treaty is an objective one. The Court of Justice has repeatedly pointed out that even
relatively small amounts of aid may be susceptible to affect trade and competition within
the internal market. Because \textit{de minimis} support is not considered to constitute aid within
the meaning of Article 87(1) of the EC Treaty, it may be used for practically any purpose,
including purposes which in no way meet the conditions for approval of State aid under
Article 87(2) or (3). Thus any increase in the \textit{de minimis} limit could only be limited in
amount, and would not allow Member States substantially greater flexibility in
implementing the Lisbon Agenda.

13. The new approach builds on the principle that “size matters” in State aid and introduces
a new category of State aid (“LASA”) that exceeds the \textit{de minimis} ceilings, but which can,
subject to certain safeguards, still be regarded as too modest in size to present a significant
threat to competition at Community level and trade between Member States provided that the aid is granted in a manner which facilitates the achievement of horizontal Community objectives of common interest.

14. It must be emphasised that LASA remains State aid within the meaning of Article 87(1) of the EC Treaty, and must therefore be subject to a prior notification to the Commission, either as a scheme or as ad hoc aid, in accordance with Article 88(3).

15. The new approach will apply for all sectors of the economy, with the exception of:

- activities relating to the production, processing and marketing of products falling within the scope of Annex I of the EC Treaty;\textsuperscript{6}
- aid granted to transport companies for investments in road haulage vehicles or inland waterway vessels;
- mining companies dealing with the exploitation of coal as defined in Article 2 of Council Regulation (EC) n° 1407/2002 of 23 July 2002 on State aid to the coal industry.\textsuperscript{7}

LASA may be granted to all enterprises, including large enterprises.

16. The upper limits for LASA are set at three levels:

- LASA will be limited to 30% of the costs incurred to achieve Community objectives; this limit is defined in terms of project costs.
- The total amount of LASA that an enterprise can receive, for all projects combined, will be limited to € 1.0 million over any three-year period, including any co-financed Community contribution.
- A reviewable upper threshold will be established for the total amount of LASA which may be granted by each Member State. In order to permit the monitoring of this threshold, Member States will be required to indicate the annual budget for each LASA measure.

17. The legal basis for the approval of LASA will be Article 87(3)(c) of the EC Treaty (“aid to facilitate the development of certain economic activities or certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest”).

18. The list of measures eligible for aid under LASA will be defined in advance. As the measures are directly linked to the attainment of Community objectives, the Commission considers that they, in the current socio-economic situation of the Community, can be considered as “development of economic activities” in the meaning of Article 87(3)(c) of the EC Treaty. The eligible costs will be broadly defined (costs that are necessary for the achievement of the objectives concerned).

\textsuperscript{6} A motivation for any sectoral exclusions will be added at a later stage.
\textsuperscript{7} OJ L 205, of 2.8.2002, p. 1
19. Member States that want to make use of LASA will need to submit a credible system for the monitoring of the cumulation of LASA aid.

20. LASA schemes will be initially approved for a period of up to four years. Approval will be subject to the Member State agreeing to undertake a mid-term review of the effects of the scheme and to make the report publicly available by the end of the third year of the scheme at the latest. If this report has not been published by the end of the 3rd year of the scheme, approval of the scheme will lapse in accordance with point 39 below.

3. Detailed conditions for the application of LASA

3.1 Definition of the objectives of the measure and the eligible expenses

21. In order to qualify for approval under LASA, aid measures must demonstrably facilitate the achievement of one of the following Community objectives namely, promotion of research and development, protection of the environment, creation of new and better employment, promotion of training, risk capital, development of SMEs and regional development.

22. In its notification, the Member State should provide a sufficiently detailed description of the objective of the measures and the instruments which will be used, as well as a description of the eligible expenses. In order to be able to verify that the measure is indeed meeting its objectives, these should normally be presented as quantified targets (e.g. number of jobs to be created, number of new company start-ups expected etc). The notification should provide for a review of the effects of the scheme after a maximum of two years in the light of these targets, and for the results of this review to be made publicly available. It should also describe what mechanisms are put in place to ensure that the aid is in fact used for its approved purpose. The annual budget of the measure should also be indicated.

23. Provided that these conditions are met, the Commission will accept all expenses which are reasonably incurred in order to implement the measure. Thus for example, in the case of the provision of start-up capital to a recently created company, the Commission will accept the full amount of capital provided as eligible, without verifying whether it is being used to finance investments or consultancy, subject to the respect of the 30% limit and the maximum amount of LASA aid.

24. Nevertheless in order to be compatible with the common market, the aid must facilitate the development of certain economic activities. This implies a real effort on the part of the beneficiary. Moreover, the aid must not affect trading conditions to an extent contrary to the common interest. These provisions mean that certain types of aid can never be approved under LASA, in particular;

- LASA may not be granted to companies in financial difficulty within the meaning of the Commission’s guidelines on aid for rescue and restructuring. Because of its potential effects on competition, such aid can only be approved in accordance with those guidelines;

- aid which is granted solely in order to remove or reduce the indebtedness of a company, even if it is not in financial difficulty, cannot be considered to facilitate the development of certain economic activities, and therefore cannot be approved under LASA;

- aid to intra-Community and extra-Community export related activities, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity as well as aid contingent upon the use of domestic over imported goods is excluded from the scope of the so-called de minimis rule and likewise cannot be approved under LASA.

25. The Commission will therefore require undertakings from the Member State that these limitations will be respected. In the event that the undertakings are not respected, the Commission will seek full recovery of the aid concerned.

26. In cases where LASA aid is to be paid to the beneficiaries through intermediaries, the Commission will seek assurances from the Member State that the benefit of the aid will be passed on to the intended beneficiaries, less reasonable administrative costs.

3.2 Application of LASA to sectoral aid measures and ad hoc individual aid

27. The Commission considers that in order to be effective in meeting the broader policy objectives of the Community, LASA measures will normally take the form of horizontal aid measures. Nevertheless, ad hoc individual measures or sectoral measures may also have a role, particularly in the case of environmental measures. Accordingly Member States may also notify ad hoc individual measures as well as sectoral measures under this framework. They should, however, provide a clear explanation of why this type of measure is appropriate to meet the objectives described above.

28. However, in some cases it may be necessary to undertake a more detailed investigation of the effects of the measure on trade and competition. This may particularly be the case where a measure is intended to promote the creation of employment or the creation or expansion of an individual enterprise or in a limited specific sector of economic activity, or where it is proposed to grant aid specifically to a fragmented sector with made up of large numbers of undertakings. If an initial examination gives rise to doubts in this respect, the Commission will invite the Member State to withdraw the notification and submit an amended notification in accordance with the general State aid rules. If the Member State declines, the Commission will open a formal investigation procedure in accordance with Article 88(2) in order to provide an opportunity for the other Member States and third parties to comment before reaching a final decision.

3.3 Calculation of the maximum limit of aid per beneficiary and cumulation

29. The maximum amount of LASA expressed as a grant equivalent may not over any three year period exceed € 1.0 million per independent enterprise. The independence of the enterprise shall be determined at the level of the Member State concerned in accordance with the method set out in the Commission Recommendation of 6 May 2003 concerning
the definition of micro, small and medium sized enterprises.\(^9\) Where aid is paid through intermediaries, respect of this upper limit shall be determined at the level of the final beneficiary.

30. In the case of aid payable in several instalments, and aid in the form of interest subsidies, the grant equivalent shall be calculated in accordance with the Commission notice on the method for setting the reference and discount rates.\(^10\).

31. In the case of less transparent forms of aid, such as equity injections, soft loans, reimbursable advances or guarantees, for the purpose of the present framework, the amount of aid shall always be calculated by counting the whole of the amount injected, advanced or guaranteed against the maximum aid limit.

32. Where different LASA instruments are combined, the cumulated amount of aid may not exceed the limit. For example in case a company is awarded a grant of € 200 000 and a loan guarantee, the amount of the loan which is covered by the guarantee may not exceed € 800 000.

33. With the exception of *de minimis* support, LASA may not be cumulated with any other aid in respect of the same project.

34. Because of the difficulties of establishing upper limit on their value, and the difficulties in controlling cumulation, the Commission will not approve LASA in the form of tax exemptions or deductions unless the Member State can provide undertakings, based on a worst-case scenario, that the upper limits for LASA will not be exceeded, and that the aid will be entered in the data base mentioned in section 3.5.

### 3.4 Application of the reviewable upper threshold

35. In view of the emphasis placed by the European Council on the reduction of overall aid levels, and in order to ensure that the introduction of LASA does not lead to unintended consequences at the macro-economic level which might prove harmful to the cohesion objectives of the Community, the Commission considers it appropriate to establish, at least for an initial period, an upper threshold on the total amount of LASA which may be granted in each Member State in each calendar year. In order to ensure equal treatment of all Member States this limit will be calculated by multiplying Community GDP per capita by the population of the Member State concerned (rounded to the nearest 100 000). The upper limit will be 0.025% of the resultant figure. This figure is based on the estimates in the latest State aid scoreboard that the total aid granted by Member States on an EU-15 basis (excluding the agriculture, fisheries and transport sectors) amounted to an average of 0.43% of GDP over the three years 1999/2001, and has been established so that the total annual amount of LASA at the Community level does not substantially exceed 5% of other aid.

36. The Commission will monitor the level of LASA aid in each Member State, taking as a basis the annual budgets of schemes and the amounts of individual aid which have been notified to it. When the amount of LASA reaches 80% of the threshold, the Commission

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\(^9\) OJ C 118, 20.5.2003, p. 5.

\(^10\) OJ C 273, 9.9.1997, p.3
will examine any request to increase the threshold in cooperation with the Member State, in the light of the experience acquired under this framework, having regard in particular to whether the increase in LASA results from a reorientation of aid away from potentially more distortive aid measures rather than an increase in the overall amount of aid granted by the Member State. If the Commission has doubts about the effect on competition of accepting the request, it will launch the formal investigation procedure pursuant to Article 88(2) of the EC Treaty in order to seek comments from the other Member States and third parties before reaching a final decision.

37. Each year the Commission will publish in the State aid scoreboard information concerning the amount of LASA approved in each Member State, in national currency and as a percentage of GDP.

3.5 Monitoring and transparency

38. In order to ensure that the award of LASA aid does not give rise to unacceptable distortions of trade and competition, it is essential to ensure that appropriate arrangements for the monitoring and transparency of LASA aid are put in place by Member States. As a minimum, these arrangements must consist of:

- the systematic verification of the independence of each enterprise receiving LASA in accordance with the method set out in the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium sized enterprises;

- safeguards to ensure that the amount of LASA granted does not exceed the different limits set out above;

- safeguards to ensure that LASA is not cumulated with any other aid in respect of the same project.

39. Having regard to the wide range of objectives for which LASA may be granted, and the large number of aid awarding authorities in each Member State, the Commission considers that the only way such safeguards can be provided is through the establishment of a single data base in each Member State which can be consulted by all aid awarding authorities and by the Commission, and which, as a minimum identifies the name of the beneficiary, the amount of LASA provided and the national legal basis for the provision of aid. In the interests of transparency, this data base should also be publicly accessible through the internet. Approval of LASA will therefore be subject to the establishment of such a data base.

40. As well as monitoring total aid amounts and cumulation, it also appears necessary to put in place arrangements to monitor the extent to which aid granted under this new framework does in fact contribute towards the realisation of the objectives for which it is granted. Accordingly approval of LASA schemes will be conditional on the preparation of a report by the Member State, at the latest two years after the date of approval of the scheme, describing the effects of the aid measure and the extent to which it has met the targets which have been established. If this report has not been published by the end of the 3rd year of the scheme, approval of the scheme will lapse.
41. Member States will also be expected to provide annual reports on LASA schemes in accordance with the general arrangements laid down by the Commission.

4. Notification and approval of LASA

42. As emphasised above, all aid granted under this new framework remains subject to notification and approval by the Commission in accordance with Article 88(3) of the EC Treaty. Notification should be made on the standard notification form established by the Commission, and the Supplementary Information Sheet should also be completed.

43. LASA schemes will be initially approved for a period of up to four years. However, the Commission reserves the possibility to propose appropriate measures to Member States in accordance with the procedure laid down in Article 18 of Regulation (EC) 659/1999\(^\text{11}\) if it appears that a particular measure is having unforeseen effects on competition or trade within the Community.

5. Entry into force, duration and relationship with other frameworks

44. This framework will enter into force on the date of its publication in the Official Journal of the European Union. It will remain in force, unless otherwise stipulated in a new decision until 31 December 2006. As regards notified aid, it shall apply only to notifications submitted to the Commission after its entry into force. It shall not apply to any aid illegally put into effect in breach of the notification obligation in Article 88(3) of the EC Treaty before its entry into force. Illegal aid put into effect after its entry into force will be assessed in accordance with the criteria of this framework only if all the conditions laid down herein were satisfied at the moment the measure was put into effect.

45. As indicated above, this framework is intended to provide an alternative more flexible approach for the approval of lesser amounts of State aid. It in no way amends any existing Commission regulation, decision, framework, guideline or communication. It follows that Member States may continue to grant aid falling within the scope of these instruments as before, where necessary following notification to the Commission. However, as indicated above aid granted under this framework may in no case be cumulated with aid granted under other Community texts in respect of the same project.

46. The Commission will also take account of the experience acquired under this framework during the future review of other Community State aid texts. Any future review of this framework would have to take into account, among other things, developments in the overall socio-economic objectives of the Community.