Draft Communication from the Commission

A new framework for the assessment of State aid which has limited effects on intra-Community trade

1. Introduction

1. The objective of this Communication is to set out a simplified framework for the assessment of State aid measures which, because of their nature, can be expected to produce only limited effects on intra-Community trade (hereafter LET measures) and which therefore should not be a cause of concern at the Community level. This communication is therefore an integral part of the Commission’s efforts to modernise and simplify the State aid rules, allowing Member States greater flexibility to design aid measures while maintaining the principle of a strict State aid control, as required by the Treaty.

2. The requirement of an effect on trade is a constitutive element of the definition of State aid in Article 87(1) of the EC Treaty. A measure which produces no effect on trade does not constitute a State aid.

3. However, the concept of effect on trade in Article 87(1) of the EC Treaty is extremely broad in scope. “(…) when (…) aid from State resources strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid (…). Furthermore, an aid may be of such a kind as to affect trade between Member States and distort competition even if the recipient undertaking, which is in competition with undertakings from other Member States, does not itself participate in cross-border activities. Where a Member State grants aid to an undertaking, internal supply may be maintained or increased, with the consequence that opportunities for undertakings established in other Member States to offer their services to the market of that Member State are reduced (…).”

4. The fact that aid is granted in respect of purely local activities does not of itself preclude the possibility of an effect on trade between Member States. “(…) it is not impossible that a public subsidy granted to an undertaking which provides only local or regional transport services and does not provide any transport services outside its State of origin may none the less have an effect on trade between Member States.” “Where a Member State grants a public subsidy to an undertaking, the supply of transport services by that undertaking may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of providing their transport services in the market in that Member State (…).”

5. Moreover, “(…) the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-

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2 Judgement of the Court of Justice of 24 July 2003 in Case C-280/00 Altmark (not yet reported in the ECR), paragraphs 77 and 78.
Community trade might be affected.” In sectors which are exposed to strong competition, even a very small amount of aid may be considered to affect trade. However the Court has also recognised that in particular economic sectors which are not exposed to such intense competition at Community level, a small amount of aid to an undertaking over a given period does not affect trade between Member States. Thus the Commission was entitled to reach the view, in the exercise of its discretion to assess the economic effects of aid, that, other than in certain sectors where competitive conditions are of a particular kind and except in respect of export aid, aid in amounts falling below those laid down in its Notice on the de minimis rule for State aid does not affect trade between Member States. This notice has subsequently been replaced by Commission Regulation (EC) No 69/2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid. The Regulation provides that aid of up to € 100,000 per enterprise over any three year period is considered not to meet all the criteria of Article 87(1) of the EC Treaty except for aid to the transport sector, for activities linked to the production, processing and marketing of Annex I products, aid to export-related activities and aid contingent on the use of domestic over imported products.

It should be emphasised that this Communication in no way seeks to reinterpret the case law of the Community Courts, or to call into question the concept of effect on trade as outlined above. Rather, as part of its discretion to assess the economic effects of aid, the Commission is seeking to identify those characteristics of aid measures which make it possible to consider that the measures will produce only limited effects on trade, and which may therefore be subject to a simplified assessment procedure. Such measures will continue to constitute aid, and remain subject to prior notification to the Commission in accordance with Article 88 (3) of the EC Treaty.

2. Economic rationale

While it is clear that all distortions of competition and impediments to the single market imply costs to the Community that warrant some form of control, not all distortions are of the same magnitude and imply the same costs. It should then be possible to characterise situations for which the distortion of competition at the Community level is less important.

This is the case of a measure that, by its nature, produces limited potential spillovers outside the boundaries of the Member State where it takes place. When the effects of a measure are limited and mostly confined within national or regional borders, the choice of national authorities concerning State intervention is more likely to be consistent with the principles of compatibility with the common market. Indeed, an aid with limited effect on other Member States is more likely to fulfil the requirement for compatibility of Article 87(3)(c) of the EC Treaty of “not adversely affect[ing] trading conditions to an extent contrary to the common interest”.

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3 Case C-142/87, Belgium v Commission (Tubemeuse) [1990] ECR I-959, paragraph 43.
4 See, for example, Case C-113/00 Spain v Commission [2002] ECR I-7601, paragraphs 30 to 33, in which the Court held that an aid to Spanish horticulture producers of an average amount of approximately € 750 affected trade between Member States.
Conversely, measures with important cross-border effects are much more likely to cause significant distortions of competition between Member States, and therefore require a more careful assessment of their positive contribution to Community interests.

10. Among the possible negative effects that aid measures can have from the point of view of other Member States, two are of particular importance:

a) A shift of economic activities towards the Member State providing the aid measure. This might lead to a decrease of domestic production in other Member States and cause, among others, lower employment, lower tax revenues and lower positive spill over on production factors;

b) A reduced ability of firms that do not benefit from the aid measures (either because they are not located in the Member State providing the aid, or because they are excluded from it) to invest and compete with the aided firms. This can take the form of barriers to entry in foreign markets, or unfair competition in home markets for non-aided firms, predatory pricing and other anti-competitive behaviour from aided firms.

11. As regards the negative effects in 10a), a distinction has to be drawn between tradable and non-tradable activities. Only aid capable of supporting a tradable activity has this effect, because only in this case will the aid affect exports or imports of products or services. Conversely, the amount of domestic production of a ‘non-tradable’ good or service has no impact on production abroad of the same product. A ‘non-tradable’ good or service can be defined as one that: i) by its nature has limited potential for trade and ii) is not capable of attracting a significant number of customers from another location7.

12. The lack of negative effects due to shifts in location does not mean that no negative effects of the type described in 10b) are produced. A firm that produces a ‘non-tradable’ good may be present in different national markets; should it receive aid, its position might be reinforced in all those markets. Similarly, an aid to a domestic producer might create a barrier to entry for other firms.

13. However, there are situations in which these negative effects are significantly reduced for non-tradable activities:

a) Other things equal, smaller amounts of aid are less capable of providing beneficiaries with the means to affect competitors, for example by creating barriers to entry, or by expansion in foreign markets;

b) Aid available to all enterprises carrying out a given activity and awarded on non-discriminatory terms is less likely to distort competition among them;

c) Similarly, aid dispersed among numerous competitors is less likely to be retained at company level, supporting anti-competitive behaviour of one or few players, and more likely to benefit the customers of the aided activity.

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7 For example, aid to the domestic retail industry is not likely to affect the supply of the same services abroad. On the other hand, aid to a big theme park would be capable of affecting supply abroad. Although the services of the theme park are rendered locally, they are capable of attracting non-resident users, which could be diverted from other destinations.
Based on the considerations above, the Commission considers that there is scope for a simplified assessment of measures providing sufficient guarantees of a limited effect on trade. The following factors appear to be particularly relevant in assessing the impact on trade of different aid measures:

- the amount of aid;
- the tradable/non-tradable nature of the aided activity;
- the competitive structure of the markets concerned;
- the possible market power of the beneficiaries;
- the availability of the aid to different operators in the market.

### 3. Scope and detailed rules

15. This communication applies in all sectors of the economy with the exception of activities relating to the production, processing and marketing of [agricultural and] fisheries products falling within Annex I of the EC Treaty, aid granted to the transport sector and aid granted to the coal sector.

16. As argued in the previous section, the impact of aid on trade between Member States is more limited for activities that have a prominently local character, that are not carried out in excessively concentrated sectors, and that are available to all operators in the market.

17. Aid to tradable activities can have significant effects on trade. Aid to firms in one Member State results in increased domestic production and can lead to lower import from other Member States and/or greater export in other Member States. Furthermore, aid to tradable activities can divert production by attracting firms that could have otherwise invested in another Member State.

18. These types of effects would generally be absent in non-traded sectors. However, there are sectors, particularly in the service industry, where certain segments of the market are non-traded, but closely related to the activity in traded segments. In banking and insurance, for instance, there is a close link between the mostly domestic retail business and the activity in the international capital markets and the entire sector therefore has to be considered as tradable.

19. Finally, there are sectors that are highly concentrated and/or where liberalisation has not yet been entirely completed and competition is still developing. The potential for foreign direct investment in these sectors is high and so is the risk of aid reinforcing dominant positions and barriers to entry. In all those cases – which include production and wholesale in network industries – it is appropriate to exclude these activities entirely from this communication.

20. Based on these considerations, the Commission considers that the simplified assessment rules should apply to a limited number of activities that, by their nature, do not produce significant cross-border effects or do not appear to be characterised by high concentration and barriers to entry. The list is specified in Annex I to this communication.

21. However, the *a priori* identification of activities that are unlikely to produce significant cross-border effects is, alone, not sufficient to guarantee that negative spill-overs on other Member States will be averted. As the analysis above has shown,
significant negative spill-overs could be produced in a number of situations in which aid is granted to non-tradable activities:

- aid given to companies performing the identified activities is redirected at other markets where the beneficiaries are present;
- large amounts of aid are granted;
- aid is used to create or maintain a dominant position in some markets.

22. For this reason, it is important to ensure that specific conditions aimed at avoiding the situations above apply to aid measures directed at the identified activities. In particular, the specific conditions should ensure that:

- aid is linked to eligible expenses directly incurred in carrying out the activities concerned;
- there is a limit to the amount of aid that can be granted to a single beneficiary;
- aid is granted in a way that prevents beneficiaries from using it to reinforce their position vis-à-vis other firms carrying out the same activity;

23. The following additional conditions imposed should guarantee that, for the activities listed in Annex I, the negative effects of the LET aid measures is kept to a minimum:

(1) LET aid will be limited to 30% of the costs incurred for the development of the aided activity; this limit is defined in terms of project costs.

(2) The total amount of LET aid that an enterprise can receive, for all projects combined, will be limited to €3 million per year, including any co-financed Community contribution.

(3) LET aid must be awarded through:

   (3a) a scheme that is open to all companies willing to carry out the identified activities within the jurisdiction of the granting authority, according to objective criteria; and does not allow for a single beneficiary to get more than 10% of the total budget of the scheme actually spent; or:

   (3b) a tender procedure which ensures that the amount of aid granted in connection with the project is limited to the minimum necessary.

24. It should be emphasised that the inclusion of an activity in Annex I in no way prejudices the question of whether the particular measure concerned constitutes a State aid within the meaning of Article 87(1) of the EC Treaty. It merely indicates that if the measure concerned does indeed constitute an aid, it is eligible for a simplified assessment in accordance with the principles set out in this communication and can be considered as compatible with the common market if the conditions provided for in this communication are met.
4. Basis for approval and forms of aid

25. The legal basis for approval of LET aid measures will be either Article 87(3)(c) or Article 87(3)(d) of the EC Treaty. In order to qualify for approval under LET, 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, regional development, cultural promotion and heritage conservation. The examination of the economic effects of the aid in accordance with the criteria set out above will make it possible to exclude the possibility that the aid will adversely affect trading conditions to an extent contrary to the common interest. However, the Member States concerned will also be expected to explain clearly and succinctly in the notification precisely how the aid will facilitate the achievement of the Community objectives. The Commission reserves the right to seek additional information if these elements are not clearly explained in the notification.

26. In order to be compatible with the Treaty, 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 LET, in particular;

- LET aid 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 LET;

- 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 LET.

27. 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.

28. In cases where LET 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.

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5. Notification, transparency and reporting

5.1. Notification and approval

29. All LET aid measures remain 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 set out in Annex II of this framework should also be completed.

30. 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 if it appears that a particular measure is having unforeseen effects on competition or trade within the Community.

5.2. Calculation of the maximum limit of aid per beneficiary and cumulation

31. The maximum amount of LET aid expressed as a grant equivalent may not exceed €3 million per independent enterprise per year. 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. Where aid is paid through intermediaries, respect of this upper limit shall be determined at the level of the final beneficiary.

32. 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.

33. 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 communication, the amount of LET aid shall always be calculated by counting the whole of the amount injected, advanced or guaranteed against the maximum aid limit.

34. Where different instruments are combined, the cumulated amount of LET aid may not exceed the limit. For example in case a company is awarded a grant of €2 000 000 and a loan guarantee, the amount of the loan which is covered by the guarantee may not exceed €1 000 000.

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

36. Because of the difficulties of establishing upper limit on their value, and the difficulties in controlling cumulation, the Commission will not approve aid in the form of fiscal exemptions or deductions unless the Member State can provide

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10 OJ C 118, 20.5.2003, p. 5
undertakings, based on a worst-case scenario, that the upper limit for the LET aid will not be exceeded, and that the aid will be entered in the data base mentioned in section 5.3.

5.3. Monitoring and transparency

37. In order to ensure that LET aid measures do not give rise to unacceptable distortions of trade and competition, it is essential to ensure that appropriate arrangements for the monitoring and transparency of the aid are put in place. As a minimum, these arrangements must consist of:

- the systematic verification of the independence of each enterprise receiving aid pursuant this communication 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 aid granted does not exceed the limit set out above;

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

38. Having regard to the wide range of objectives for which the aid 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 allows the verification of the arrangements specified in point 37. In the interests of transparency, this data base should also be publicly accessible through the internet. Approval of aid will therefore be subject to the establishment of such a data base.

39. Member States will be expected to provide annual reports on schemes in accordance with the general arrangements laid down by the Commission.

6. Conclusion

40. The Commission intends to apply the terms of this communication 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 communication only if all the conditions laid down herein were satisfied at the moment the measure was put into effect.

41. Given that the approach of this communication represents a departure from previous methods of State aid control, and that it deals with an area of rapid development in the Community economy, the Commission reserves the right to adjust its approach in the light of experience. Where this would be helpful it may also provide further clarifications of its approach to particular issues.
42. As indicated above, this communication is intended to provide an alternative more flexible approach for the approval aid with limited effects on trade. 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.
<table>
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<tr>
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<tr>
<td>10.30</td>
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<td>Other mining and quarrying</td>
</tr>
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<td>22.12</td>
<td>Publishing of newspapers</td>
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<td>22.13</td>
<td>Publishing of journals and periodicals</td>
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<td>Manufacture of plaster</td>
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<tr>
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<td>Cutting, shaping and finishing of ornamental and building stone</td>
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<td>Steam and hot water supply</td>
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<td>Site preparation</td>
</tr>
<tr>
<td>45.3</td>
<td>Building installation</td>
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<tr>
<td>45.4</td>
<td>Building completion</td>
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<td>50.4</td>
<td>Sale maintenance and repair of motorcycles and related parts and accessories</td>
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</tr>
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<td>52.1 to 52.7</td>
<td>Retail sale in non-specialized stores</td>
</tr>
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<td>Hotels and restaurants</td>
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<td>70.1 and 70.2</td>
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<td>71.1 and 71.4</td>
<td>Renting of automobiles</td>
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<tr>
<td>74.1 to 74.8</td>
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<td>Health and social works</td>
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</tr>
<tr>
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<td>Activities of membership organisation</td>
</tr>
<tr>
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<td>Library, archives, museums and other cultural activities</td>
</tr>
<tr>
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<td>Other services activities (includes washing and dry cleaning, hairdressing, and similar activities)</td>
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