On 3 May 2005, the Commission authorised, on the basis of Article 87(3)(c) EC, a German aid scheme providing public support for the creation or development of incubators and technology centres, with newly created and technology-oriented small and medium-sized enterprises (SMEs) using the services of the centres being the indirect beneficiaries (1). The annual budget of the scheme, which will run until end 2006, amounts to € 120 Mio.

Aim and design of the aid scheme

The importance of incubators and technology centres is threefold. Firstly, they favour the setting up of new companies, secondly, they provide the appropriate business support needed to increase the chances of their survival and, thirdly, they provide infrastructure and services to undertakings involved in innovative activities.

The aid scheme intends to support the SMEs by giving them the possibilities to rent rooms, to obtain consultancy services, research accommodation and special equipment, as well as to cooperate with universities, research institutes and enterprises in or via the centres.

However, instead of directly supporting the targeted SMEs, Germany will provide financial support to a certain group of investors in order to encourage them to construct a building for the purpose of a technology centre or incubator, so that these centres can let facilities and provide services to the targeted group of SMEs.

In order to better understand the design of the measure, three different levels of operators have to be distinguished: the investors into the centres, the centres and their management and the tenants of the centres. The investors of the centres are defined as municipalities and counties, but can also be public or private non-profit-making establishments. The centres are usually either non-profit-making owner-operated municipal enterprises or separate non-profit-making legal entities. The tenants may be newly created or technology-oriented SMEs.

The tenants have to pay a tenancy for the rooms and top-ups for the use of other facilities like laboratories or specific equipment and/or consultancy services if applicable. The tenancy and/or the price for other facilities/services will normally be below market price. The tenants can use the centres for normally five years whilst the centres will be obtained for at least 15 years.

Assessment

The rather complex design of the measure made it very difficult to identify the aid beneficiaries and to conclude the compatibility of the measure with the common market.

The measure at stake creates incentives for one set of potential economic operators, the holders, in order to provide support to another set of operators, the tenants. In addition, the measure implies that a third set of potential economic operators is created, the centres, which are existing separately from the holders and the tenants. Even if the intention of the German authorities may be only to provide benefits to the tenants, enterprises at either one or all three levels may be beneficiaries of State aid.

Accordingly, the Commission assessed the existence of aid at three different levels: the level of the holders, the level of the centres and their management and the level of the tenants.

In its decision, the Commission considered that the holders could actually only be regarded as a vehicle for the transfer of aid to the tenants (through the centres) rather than being an aid beneficiary themselves. Germany could prove that no economic advantage will remain at the level of the holders as there will be a public tender for the construction of a centre, as the holders are obliged to obtain the centres and to let their accommodation for, at least, a period of 15 years and as any potential advantage remaining after this period will be re-transferred to the State, calculated by applying common evaluation methods.

The centres and their management were also considered as vehicles for the transfer of aid to the tenants as they do not receive an economic advantage under the scheme. In case a centre is to be managed by third parties and not by the holder, the German authorities committed themselves then to tender the management of a centre. The management of a centre will only receive a market conform remuneration as pre-defined in the tender. The German authorities undertook to also apply the aforementioned profit-transfer at the level of the centres.

They furthermore committed themselves to monitor the measure and to strictly control the use of funds, thereby ensuring that the aid is completely passed through to the tenants.

However, concerning the tenants of the centres, the Commission concluded that, through the holders and the centres, the SMEs who rent accommodations in the centres and use their facilities benefit indirectly from State resources and receive an economic advantage in such cases where the tenancy and/or other facilities are granted below market price. It was further considered that the measure distorts or may distort competition as it targets certain undertakings, the tenants, and affects trade as the award of the advantage to SMEs engaged in economic sectors where intra-Community trade takes place is not ruled out.

As Germany, in the course of the investigation procedure, had committed to apply Regulation (EC) No 69/2001 (1) concerning de minimis aid at the level of the tenants, the Commission concluded that the measure constitutes State aid within the meaning of Article 87(1) EC insofar as it exceeds the ‘de minimis’ threshold of € 100,000 per beneficiary over a three years period.

Concerning the application of the de minimis threshold to the different facilities offered by the centres, the Commission noted the following:

- Insofar as the renting of rooms is concerned, it was noted that the German authorities had committed themselves to respect the provisions of Regulation (EC) No 69/2001 at the level of the tenants. Germany undertook to calculate the aid elements of the tenancy for the rooms rented by the tenants on the basis of the equivalent comparative rent of similar premises. Thus, Germany could ensure the respect of the de minimis — threshold of 100,000 € over a period of three years. Germany will therefore inform each end-user of the centre that there may be an aid element when using the services of a centre, which will be counted as de minimis aid and be subject to the requirements of Regulation (EC) No 69/2001.

- Insofar as the use of laboratories and other specific equipment is concerned (in particular in technology centres), the German authorities informed that this aid element is reflected in a top-up on the tenancy. It can therefore be separated from the normal rent. It is noted that the German authorities also committed themselves to respect Regulation (EC) 69/2001 with regard to these top-ups for the rent of laboratories and specific equipment.

However, as to the consultancy services, the aid element was not limited to the de minimis threshold and had to be considered as State aid falling within the scope of Article 87(1) EC.

The aid could be approved pursuant to Article 87(3)(c) EC as Germany, in the course of the investigation procedure, undertook that the prices for consultancy services would never be below 50% of the market prices. The aid could thus be considered as being in accordance with Regulation (EC) 70/2001 (2) concerning aid for SMEs, particularly Article 5 thereof.

Conclusion

The presented case is remarkable for three reasons:

Firstly, it concerns several levels of operators, a legal situation that is currently solely addressed in the Commission communication on State aid and risk capital (3) and in point 2.4 of the Community framework for State aid for research and development (4), but both times for rather specific situations. The Commission's scrutiny showed how difficult it often is to identify the aid beneficiary and to achieve the compatibility of such measures.

Secondly, even if it may not be obvious from the decision text, it demonstrates the importance of strengthening the economic approach to State aid analysis, be it to identify the aid and the aid amount, or be it, in the context of the compatibility assessment, as an instrument to better focus and target certain State aid towards the objectives of the re-launched Lisbon Strategy.

Lastly, although an approval could be achieved on the basis of the currently existing State aid rules, the case indicates that incubators and technology centres as intermediaries providing infrastructure and services to undertakings involved in innovative activities may not be sufficiently covered by existing State aid rules.

The Commission, in particular with its consultation documents on the State aid action plan (5) and on Innovation and State aid, is currently seeking to address such issues in future State aid rules.

(3) OJ C 235, 21.08.2001, p. 3.
(5) See http://europa.eu.int/comm/competition/state_aid/others/action_plan/