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## **REPORT**

### **State Aid Scoreboard**

- spring 2007 update -

(presented by the Commission)

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## EXECUTIVE SUMMARY

The spring 2007 update of the State aid Scoreboard aims to present unlawful aid in the context of the State aid control system established by the EC Treaty, the problems regarding this phenomenon and possible ways to improve compliance with the notification and standstill obligation. It also provides an overview of available statistics on previously granted unlawful aid that is known to the Commission. The Scoreboard also includes its customary summary of ongoing work to modernise State aid control through legislative and policy means, statistical overview of State aid measures falling under block exemption regulations and an overview on State aid procedures in 2006.

### ***1) State aid control system can only work effectively if all state aid measures are duly notified by Member States***

The state aid control system established by the EC Treaty comes from the need to ensure a balance between the Member States' freedom to design their economic policies and the need to ensure a level playing field for all undertakings active in the internal market, no matter what Member State they are established in. Such a system can only work if the Commission is duly informed in advance about Member States planned actions in this field. Therefore, aid measures that are not notified to the Commission and implemented by Member States before the Commission's final decision are considered to be unlawful.

### ***2) More than 600 decisions on unlawful aid measures between 2000 and 2006***

In the 7-year period 2000-2006, the Commission took 608 decisions on unlawful aid. In addition, there are around 200 pending unlawful aid cases which are still under Commission scrutiny. These cases are taken up by the Commission in reaction to a complaint or *ex officio* (case started at the Commission's own initiative). The figures also include cases notified by a Member State, but for which the measure was fully or partially implemented by the Member State before the Commission's final decision (i.e., cases where the standstill clause was not respected).

### ***3) Intervention level for unlawful aid around ten times higher than for notified aid***

In the period 2000-2006, the Commission had to open a formal investigation procedure in around 40% of unlawful aid cases. By comparison, this share is much lower (5%) for decisions on notified aid, for which the Commission was able, in most of the cases, to take a final decision just after the preliminary examination procedure. Looking at industry and services only, the corresponding percentages were 60% for unlawful decisions and 8% for notified aid. In the other sectors, the share of unlawful aid cases in which a decision was taken at the end of the formal investigation procedure are as follows: 25% for transport and coal, followed by agriculture (15%) and fisheries (8%).

In the period under review, the Commission 'intervened' in 25.6% of unlawful aid cases by taking a negative decision on an incompatible aid measure (24.0%) or taking a conditional decision (1.6%). The need for the Commission to intervene in the granting of aid with a negative or conditional decision for at least a part of the aid unlawfully implemented by the Member State concerned is around ten times higher than that for notified aid decisions (2.7%).

The share of cases (25.6%) in which the Commission needs to intervene varies considerably according to sector: 37% of unlawful aid cases in the industry and services sectors, followed by transport and coal (17%), agriculture (9%) and fisheries (5%).

#### ***4) More than one-third of detected unlawful aid is for rescue and restructuring aid***

In the industry and services sectors more than one-third of decisions on unlawful aid concern rescue and restructuring cases, a type of aid which is potentially most prone to distort competition. In comparison, less than 5% of notified cases concern rescue and restructuring aid.

#### ***5) Share of incompatible unlawful aid tends to be higher in the large Member States and in the industry and services sectors***

Some 73% of the 608 decisions on unlawful aid over the period 2000-2006 concerned the five largest Member States: Germany (24% of the EU-25 total of decisions on unlawful aid), Italy (17%), Spain (12%), France (10%) and United Kingdom (9%). With the exception of the United Kingdom, these Member States each have a relatively high share of incompatible aid, particularly in the industry and services sectors, e.g., in Spain, the aid was found to be incompatible in 48% of decisions involving unlawful aid.

A further 25% of the 608 decisions on unlawful aid concerned the other ten EU-15 Member States while less than 2% (11 decisions) involved four EU-10 Member States (the Czech Republic, Hungary, Poland and Slovakia). In addition, there were 35 unlawful aid cases registered at the end of 2006 for 8 of the EU-10 Member States.

#### ***6) The State Aid Action Plan (SAAP) stressed the Member States' crucial role in tackling unlawful aid: to ensure i) respect of the notification obligation and ii) immediate and complete implementation of Commission recovery decisions***

The obligation for Member States to notify planned state aid measures is established by Article 88(3) of the EC Treaty. The SAAP has stressed the need to strengthen Member States' commitment to enforcing the state aid rules. It also insists on the fact that 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.

#### ***7) The amount of aid effectively recovered has increased significantly ... but further efforts are required to ensure a more immediate and effective execution of recovery decisions***

In line with the SAAP, recent efforts point to a marked improvement in the execution of recovery decisions, leading to an increase in the amount of incompatible aid recovered and a decrease in the backlog of pending cases.

By the end of December 2006, some €6 billion of unlawful and incompatible aid had been effectively recovered. In addition, €2.1 billion of interest had been recovered and a further €1.2 billion of unlawful and incompatible aid was declared as lost in bankruptcy proceedings.

The €6 billion of aid effectively recovered represents 71% of the total amount of unlawful and incompatible aid to be recovered. This figure reflects a significant improvement on the situation in December 2004 when only 25% of the total amount of aid to be recovered had been reimbursed.

The improvement in the execution of recovery decisions is also reflected in a significant fall in the number of recovery decisions pending execution. As of 31 December 2006, there were 60 pending recovery decisions, compared to 93 in December 2004. Spain makes up 28% (17 cases) of the total while Germany, Italy and France combined account for a further 55% of all pending recovery cases. There are no pending cases in fifteen of the EU-25 Member States.

In spite of the recent improvements, experience shows that the implementation of recovery decisions by Member States is still far from being satisfactory and, therefore, the Commission will continue to seek to achieve a more immediate and effective execution of recovery decisions, which will ensure equality of treatment of all beneficiaries.

***8) The SAAP announced a stricter approach for the Commission to tackle unlawful aid: Deggendorf case-law and possible use of Article 226 and 228 of EC Treaty.***

The *Deggendorf* case-law (see section 1.5.3) confirmed that, when assessing a new aid measure, the Commission has the power to take into account the fact that the beneficiary of this new aid has not fully repaid earlier unlawful and incompatible aid that was subject of a recovery decision. In such cases the Commission may eventually decide that the otherwise compatible aid cannot be paid out as long as the previous aid has not been fully reimbursed. Between 1997 and 2005 *Deggendorf* case-law was applied only occasionally in relation to individual aid cases. In 2005, in line with the measures announced in the SAAP, the Commission decided to apply it in a more systematic way. The new approach has now been in operation for almost two years. The Commission considers that it has increased pressure on the Member States to pursue the execution of recovery decisions in a more diligent manner.

In line with the measures announced in the SAAP, the Commission is monitoring more closely, in accordance with national procedures, the execution of recovery decisions by Member States. Where it appears that recovery is not carried out in an immediate and effective manner, the Commission is more actively pursuing non-compliance under Articles 88(2), 226 and 228 of the EC Treaty.

***9) The block exemption regulations appear to have significantly reduced the administrative burden***

The number of notifications to grant training aid, employment aid and SME aid has fallen considerably since 2001 as Member States make increasing use of the possibilities offered by the block exemption regulations. By the end of 2006, more than 1700 information forms on block exempted measures had been submitted since the introduction of the regulations for SME and training in 2001. In 2006 alone, the Commission received more than 400 forms on exempted measures.

***10) Member States notified more than 900 aid measures in 2006, (a 36% increase compared with the previous year)***

In 2006, there were 1009 cases (excluding block exempted measures) registered by the Commission: 921 cases were notified by Member States, 84 were non-notified cases initiated by the Commission and 4 were cases examining existing aid. Excluding the block exemption aid measures, 53% of all registered cases in 2006 concerned the industry and service sectors and 34% the agricultural sector. Of the remaining cases, 9% involved transport and coal, and 3% the fisheries sector.

***11) In 2006 the Commission approved the award of State aid in 90% of its decisions***

In 2006, the Commission took 710 final decisions, a 12 % increase on 2005. In the vast majority of cases, the Commission approved the measures, concluding that the examined aid was compatible (91 % of all decisions in 2006) with the State aid rules or did not constitute State aid (4 % of all decisions). Where the Commission has doubts whether certain aid measures comply with the rules, it carries out a formal investigation during which third parties and all Member States are invited to provide observations. At the end of this investigation procedure, the Commission either takes a positive, conditional or no aid decision (making up 3 % of all decisions) or concludes that the measure does not comply with State aid rules and hence is not compatible with the Common Market and takes a negative decision (2 % of all decisions).

## INTRODUCTION

The spring 2007 update of the State aid Scoreboard aims to present unlawful aid in the context of the State aid control system established by the EC Treaty, the problems regarding this phenomenon and possible ways to improve compliance with the notification and standstill obligations. It also provides an overview of available statistics on the part of unlawful aid that is known to the Commission. (i.e. measures for which there has been a Commission decision).

This update of the Scoreboard is divided into four main parts. Part One focuses on unlawful aid and has five sections: an overview of the notification and standstill obligations, factual information, recovery of aid, negative decisions without recovery and tackling unlawful aid.

Part Two describes recent progress in legislative and policy developments in State aid. Part Three provides a statistical overview of State aid measures falling under the five block exemption regulations (block exemptions for aid to SME, training aid, employment aid, aid to SME in the agricultural sector and certain types of aid in the fisheries sector). Part Four provides an overview of State aid procedures in 2006.

In addition to this paper edition, a permanent online Scoreboard consisting of a series of key indicators and a range of statistical information for the EU Member States is available on the on the homepage of the Competition Directorate General's Internet site ([http://europa.eu.int/comm/competition/state\\_aid/scoreboard/](http://europa.eu.int/comm/competition/state_aid/scoreboard/)).

The autumn 2007 Scoreboard will cover State aid awarded in EU-25 for the year 2006.

## 1. PART ONE: UNLAWFUL AID

### 1.1. Unlawful aid – what is at stake?

#### 1.1.1. From 1957

The state aid control system established by the EC Treaty comes from the need to ensure a balance between the Member States' freedom to design their economic policy and the need to ensure a level playing field for all undertakings active in the internal market, no matter which Member State they are established in.

It is submitted that state aid distorts competition in the internal market. State aid may also lead to a reduction in the overall competitiveness of European industry by providing unwarranted selective advantages to some firms (which are not always the most performing ones – i.e., rescue and restructuring aid cases), preventing or delaying market forces from adapting to forthcoming challenges and rewarding the most competitive firms.

However, state aid can sometimes be an effective tool for achieving objectives of common interest (such as research and development, environment protection, energy and transport networks, social and regional cohesion, sustainable development or cultural diversity) without distorting competition and trade to an extent contrary to the common interest. They can also contribute to correcting market failures<sup>1</sup>, thereby improving the functioning of markets and enhancing European competitiveness. In those cases in which the benefits brought about by the aid measure clearly outweigh the distortions created by it, the measure can be declared compatible with the internal market.

In order to carry out this evaluation and ensure a correct balance between the two aspects involved in the implementation of state aid measures, the Treaty created a supranational mechanism of control which entrusts the Commission with the task of scrutinising and monitoring proposed and existing state aid measures by Member States to ensure that they do not distort competition and trade to an extent contrary to the common interest. Such a system can only work if the Commission is duly informed in advance about Member States planned actions in this field.

This is the reason why Article 88(3) of the EC Treaty establishes that: *"The Commission shall be informed in sufficient time to enable it to submit comments, of any plans to grant or alter aid. [...] The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision"*. This provision includes two cumulative obligations for Member States: (1) the notification obligation, and (2) the obligation to respect the standstill clause. The respect of these obligations is crucial for the overall credibility and proper functioning of the state aid control system established by the Treaty which can only be effective if Member States play according to the rules.

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<sup>1</sup> Competition is vital for the economy to be efficient. In this context, "efficiency" refers to the extent to which welfare is optimized in a particular market or in the economy at large. A "market failure" is consequently a situation where the market does not lead to an economically efficient outcome.

In cases where either of these obligations is not respected, the state aid measure is considered to be unlawful<sup>2</sup>. The unlawful aid phenomenon involves two substantive problems:

- (1) since unlawfully granted aid cannot, by definition, be subject to the *ex ante* compatibility analysis normally carried out by the Commission, it is unknown whether, and if so, to what extent, the measure is causing unacceptable distortions of competition and trade in the internal market, and
- (2) even if the unlawfully granted measure comes to light and can be tackled, it can be very difficult to restore the *ex ante* competitive situation and undo the negative effects provoked by the measure even if the aid is eventually recovered from the beneficiary.

Therefore, as the European Court of Justice (hereinafter, the ECJ) has clearly stated, enforcing the legal obligations established in Article 88(3) of the EC Treaty is crucial not only to ensure respect of the Treaty itself but also because "*[...] the purpose of the first sentence of Article 93(3) of the Treaty is to provide the Commission with the opportunity to review in sufficient time and in general interest of the Communities, any plan to grant or alter aid. The final sentence of Article 93(3) of the Treaty constitutes the means of safeguarding the machinery for review laid down by that article, which, in turn, is essential for ensuring the proper functioning of the common market [...]*"<sup>3</sup>.

### **1.1.2. ...to the XXI century**

In the context of the Renewed Lisbon Strategy for Growth and Jobs, both the Commission and the Member States have been encouraged to reconcile the apparent tension that exists between the different consequences state aid measures may have for the development of the European economy. The European Council<sup>4</sup> has explicitly invited Member States "*to continue working towards a reduction in the general level of state aid, while making allowance for any market failures. This movement must be accompanied by a redeployment of aid in favour of support for certain horizontal objectives such as research and innovation and the optimisation of human capital. The reform of regional aid should also foster a high level of investment and ensure a reduction in disparities in accordance with the Lisbon objectives*". State aid policy can and must, therefore, contribute by itself and by reinforcing other policies to making Europe a more attractive place to invest and work, building up knowledge and innovation for growth and creating more and better jobs.

The recent Commission communication on the revision of the internal market policy<sup>5</sup> has put forward the message that "*(T)he goal of the 21<sup>st</sup> century Single Market is to make markets work better for the benefit of consumers and businesses, and to promote a more competitive and sustainable Europe. To this aim, the European Union has to ensure that the opening of markets and increasing competition results in fair commercial practices, so as to maximise*

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<sup>2</sup> Article 1(f) of Council Regulation (EC) No 659/1999, of 22 March 1999, laying down detailed rules for the application of Article 93 (now Article 88) of the EC Treaty (hereinafter, Procedural Regulation) precisely defines unlawful aid as new aid put into effect in contravention of Article 88(3) of the EC Treaty. OJ L 83 of 27 March 1999, p. 1.

<sup>3</sup> ECJ judgement of 14 February 1990 in case C-301/87, France v. Commission ("Boussac"), Rec. 1990, p. I-307. Emphasis added.

<sup>4</sup> See European Council Conclusions of November 2004 and March 2005.

<sup>5</sup> "A Single Market for Citizens – Interim Report to the 2007 Spring European Council". COM(2007)60 final of 21 February 2007.

*consumers' welfare and continues to contribute to economic growth and jobs [...]*". Fostering internal competition within the Single Market is also one of the best drivers for external competitiveness of European industry.

These objectives are clearly endangered by the Member States' practice of granting unlawful aid. The State aid Action Plan<sup>6</sup> (hereinafter, SAAP) therefore also calls for better targeted enforcement and monitoring, including the effective tackling of unlawful aid.

Certain indicators<sup>7</sup> show the particularly harmful character of unlawful aid compared to notified aid.

First, as regards unlawful aid, the Commission expresses doubts on its compatibility through an opening decision in 40% of cases compared to only 5% in the case of notified aid.

Second, the Commission prohibits at least part of the aid through a final negative decision in 24 % of all unlawful aid cases. For comparison, in notified cases the Commission is obliged to intervene with a negative decision in just 2.1% of the cases. This higher rate of Commission intervention in case of unlawful aid clearly shows a higher degree of distortion of competition and trade in the internal market created by aid awarded in breach of the EC Treaty.

Third, it is even more alarming to see that in industry and services more than one-third of decisions on unlawful aid concern rescue and restructuring cases, a type of aid which is potentially most prone to distort competition. In comparison, only below 5% of notified cases concern rescue and restructuring aid. Last autumn's State aid Scoreboard<sup>8</sup> carried out an in-depth analysis of the: rescue and restructuring aid. The results of the analysis also showed that more than half of the *ad hoc* rescue and restructuring decisions taken over the period 2000-2005 concerned unlawful aid. This breach of the Treaty concerns in particular the larger cases and the larger Member States and is more prevalent in restructuring cases than rescue cases.

The purpose of this focus chapter is to analyse the different aspects of the unlawful aid phenomenon and to present some factual information on the part of unlawful aid which is known to the Commission (i.e., measures for which there has been a Commission decision). The reader should keep in mind throughout this chapter that the statistics made available here do not present a global picture of total levels of aid unlawfully granted in the EU since, by definition, the Commission services do not possess this information.

## **1.2. Factual information on unlawful aid**

### ***1.2.1. More than 600 decisions on unlawful aid between 2000 and 2006***

The data in this section are based on the number of cases for which the Commission has taken a final decision. These cases are taken up by the Commission in reaction to a complaint or *ex*

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<sup>6</sup> See points 8 and 23 of the SAAP. COM(2005)107 final of 7 June 2005.

<sup>7</sup> For further details, see section 1.2 below.

<sup>8</sup> COM(2006)761 final of 11 December 2006.

*officio*<sup>9</sup>. In addition, the figures include cases which were notified by a Member State, but for which the measure was implemented fully or partially by the Member State before the Commission's final decision (i.e., cases where the standstill clause was not respected).

As mentioned above, this section can only look at unlawful aid measures known to the Commission. Nevertheless, the statistics offer a useful indication as to which Member States have failed most often to notify measures, what type of measures these are and how the Commission has dealt with such measures.

Following the SAAP announcement to tackle unlawful aid effectively, the Commission's services are currently exploring ways to identify areas in which hitherto "unknown" unlawful aid may have been awarded. One such possibility would be to compare national reports on public support to companies with the annual reports that Member States are required to submit to the Commission according to Article 21 of the Procedural Regulation. In most cases, the definitions of public support and state aid are rather different and therefore the reports are not directly comparable, but may nevertheless offer relevant insights.

In the period 2000-2006 the Commission took 608 decisions on unlawful aid. In addition, there are around 200 pending unlawful aid cases which are still under Commission scrutiny.

**Table 1: Number of decisions on unlawful aid in the period 2000-2006<sup>10</sup>**

	<b>Total number of decisions on unlawful aid</b>	<b>Number of decisions after preliminary examination procedure</b>	<b>Number of decisions after formal investigation procedure</b>	<b>Number of negative decisions</b>
<b>EU-25</b>	608	367	241	146
<b>Belgium</b>	26	15	11	7
<b>Czech Republic</b>	4	3	1	0
<b>Denmark</b>	17	16	1	1
<b>Germany</b>	148	68	80	46
<b>Greece</b>	12	6	6	4
<b>Spain</b>	70	35	35	24
<b>France</b>	63	33	30	16
<b>Ireland</b>	17	13	4	3
<b>Italy</b>	105	71	34	21
<b>Luxembourg</b>	3	1	2	2
<b>Hungary</b>	1	1	0	0
<b>Netherlands</b>	28	14	14	11
<b>Austria</b>	12	8	4	1

<sup>9</sup> The term "ex officio case" is used for a state aid case which is not brought to the Commission attention through a notification or a complaint but which is started at the Commission's own initiative and on the basis of its own investigation.

<sup>10</sup> In the period 2000-2006 the Commission has not taken any decisions on unlawful aid concerning six Member States: Estonia, Cyprus, Latvia, Lithuania, Malta and Slovenia. Note that EU-10 Member States joined the Union on 1<sup>st</sup> May 2004 and therefore they are not fully comparable with EU-15 Member States. As Bulgaria and Romania joined the Union on 1<sup>st</sup> January 2007, they are not included in this Scoreboard update.

<b>Poland</b>	3	1	2	1
<b>Portugal</b>	17	13	4	2
<b>Slovakia</b>	3	1	2	1
<b>Finland</b>	7	4	3	1
<b>Sweden</b>	16	14	2	1
<b>United Kingdom</b>	56	50	6	4

### *1.2.2. Intervention level for unlawful aid almost ten times higher than for notified aid*

According to the Procedural Regulation, the Commission first carries out a preliminary examination of the aid measure and then approves it<sup>11</sup> (or takes a no aid decision<sup>12</sup>), or initiates the formal investigation procedure<sup>13</sup> where it has doubts as to the compatibility of the aid. After the formal investigation procedure, the Commission can approve the aid measure as it stands<sup>14</sup> or take a positive decision with conditions subject to which an aid may be considered compatible with the common market<sup>15</sup> or intervene to stop an unjustified distortion of competition by taking a negative decision requiring the Member State to abolish the incompatible aid measure<sup>16</sup>.

In the period 2000-2006, around 40% of the decisions on unlawful aid were taken at the end of a formal investigation procedure compared with 5% of decisions concerning notified aid. Looking at the industry and services sectors only, the corresponding percentages were 60% and 8%. In the other sectors, the share of unlawful aid cases in which a decision was taken at the end of the formal investigation procedure are as follows: 25% for transport and coal, followed by agriculture (15%) and fisheries (8%).

In the period 2000-2006, the Commission intervened in 25.6% of unlawful aid cases by taking a negative decision on incompatible aid measures (24.0% of the cases) or taking a conditional decision (1.6%). The need for the Commission to intervene in the granting of aid with a negative decision or, in some cases, a conditional decision for at least a part of the aid unlawfully implemented by the Member State concerned is therefore almost ten times higher than that of notified aid decisions (2.7%).

The share of cases (25.6%) in which the Commission needs to intervene (also known as the 'intervention level') varies considerably according to sector: 37% of unlawful cases in the industry and services sectors, followed by transport (17%), agriculture (9%) and fisheries (5%).

There are a number of reasons which could explain why the intervention level is considerably higher in the case of unlawful aid than for notified aid. First and foremost is the scrutiny function that the Commission carries out in the case of notified aid. In notifying an aid measure, Member States tend to make an effort to bring it into line with the state aid rules. While the Commission frequently identifies certain issues related to the compatibility, these

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<sup>11</sup> Decision "not to raise objection" according to Article 4(3) of the Procedural Regulation.

<sup>12</sup> Decision "does not constitute aid" according to Article 4(2) of the Procedural Regulation.

<sup>13</sup> Decision "to initiate the formal investigation procedure" according to Article 4(4) of the Procedural Regulation.

<sup>14</sup> "Positive decision" according to Article 7(3) of the Procedural Regulation.

<sup>15</sup> "Conditional decision" according to Article 7(4) of the Procedural Regulation.

<sup>16</sup> "Negative decision" according to Article 7(5) of the Procedural Regulation.

can often be resolved within the scope of the notification procedure through a change in the measure. In contrast, for unlawful aid, there is no such scope for Member States to amend a particular measure and thus the greater the likelihood that the measure may be found to be incompatible. Another problem associated with unlawful aid is the lack of information that the Commission tends to receive particularly at the beginning of a preliminary examination of such a measure.

### ***1.2.3. More than one-third of detected unlawful aid is for rescue and restructuring aid***

Due to data constraints, a breakdown of unlawful aid by primary objective is possible only for the industry, services, transport and coal sectors. In 2000-2006, in the industry and services sectors, rescue and restructuring aid measures accounted for 37% of the total number of decisions on unlawful aid followed by regional development (19%), environmental protection (10%), sectoral development (7%) and research and development (6%). Of the other objectives, none made up more than 4% of the total.

In 2000-2006, in the transport and coal sectors, sectoral development measures accounted for 67% of the total number of decisions on unlawful aid followed by rescue and restructuring aid 19%, regional development (4%) and social support to individual consumers (4%). Other objectives amounted to 6% of the total.

As regards the industry and services sectors, in relative terms, decisions involving unlawful restructuring aid made up 62% of the total number of decisions on restructuring aid. Similarly, unlawful rescue aid accounted for almost half (48%) of all rescue aid. The autumn 2006 State aid Scoreboard looked in detail at rescue and restructuring aid. It concluded that unlawful aid occurs more often in the context of larger cases and is more prevalent in restructuring cases than rescue cases. As regards rescue aid, it is well recognised that Member States may be under significant time pressure to rescue an ailing firm with immediate action being perceived as the only way to keep a firm afloat, although this cannot justify a breach of the Treaty. This reason of time pressure cannot be applied to the same extent to restructuring aid where there is a need to prepare a restructuring strategy which should solve a firm's problems in the longer term. However, despite the possibility to grant rescue aid, many restructuring cases involving unlawful aid do not make use of such an option which would allow keeping a firm afloat while at the same time complying with the Treaty obligations.

### ***1.2.4. Share of incompatible unlawful aid tends to be higher in the large Member States and in the industry and services sectors***

Some 73% of the 608 decisions on unlawful aid over the period 2000-2006 concerned the five largest Member States: Germany (24% of the EU-25 total number of unlawful decisions), Italy (17%), Spain (12%), France (10%) and United Kingdom (9%) (see Table 1).

With the exception of the United Kingdom, these Member States each have a relatively high share of incompatible aid, particularly in the industry and services sectors, e.g., in Spain, the aid was found to be incompatible in 51% of decisions involving unlawful aid.

#### **(a) Germany**

The high number of decisions on unlawful aid (148 decisions in 2000-2006) in both absolute and relative terms is mainly due to unlawfully granted aid to the industry and services sectors (79%) followed by agriculture (13%) and transport (8%). Around half of the decisions in the industry and services

sectors concerned the rescuing and restructuring of companies in difficulties. Much of this aid was granted unlawfully in the late 1990s for former East German regions. Most of these decisions were taken during the period 2000-2002. The Commission found that 31% of German unlawful aid measures were incompatible with the common market. This rate was slightly higher for decisions on unlawful aid in the industry and services sector (38%).

(b) Italy

In the period 2000-2006 the Commission took 105 unlawful aid measures concerned mostly three broad sectors: agriculture (37%), industry and services (33%) and fisheries (25%). On average Italy had 15 decisions on unlawful aid per year with an exceptionally high number of decisions (29) in 2002, which was mainly due to high number of decisions in fishing sector (19). In the industry and services sectors there were 36 decisions in the period under review of which 8 decisions concerned investment aid or other aid measures not in line with the regional aid rules and 5 rescuing and restructuring of companies in difficulties. The Commission found that 20% of the unlawful aid measures were incompatible with the common market. However, for the industry and services sectors, the incompatible aid rate was around twice that figure (44%).

(c) Spain

During the period under review the Commission adopted 70 decisions on unlawful aid of which 59% concerned industry and services sectors followed by the agriculture sector (20%), transport (14%) and fisheries (7%). The Commission took 41 decisions on unlawful aid regarding the industry and services sectors of which 8 concerned regional development followed by rescuing and restructuring of companies in difficulties (6), SME (4), training (2) and environmental protection (2). The Commission found that 34% of unlawful aid measures were incompatible with the common market. This rate was significantly higher for unlawful aid cases in the industry and services sectors (48%).

(d) France

The Commission adopted 63 decisions on unlawful aid during the period under review of which 54% concerned the industry and services sectors followed by agriculture sector (22%), transport (14%) and fisheries (10%). The Commission took 33 decisions on unlawful aid regarding the industry and services sectors of which 7 were to rescue and restructure companies in difficulties followed by sectoral development (5) and regional development (4), training (2) and environmental protection (2). The Commission found that 25% of unlawful aid measures were incompatible with the common market. The rate was significantly higher (38%) for the industry and services sectors.

(e) United Kingdom

The Commission adopted 56 decisions on unlawful aid during the period 2000-2006 of which 39% concerned the agriculture sector followed by the industry

and services sectors (34%), fisheries (18%) and transport (9%). The Commission took 19 decisions on unlawful aid regarding the industry and services sectors of which 3 were to rescue and restructure companies in difficulties, as well as 3 each for culture and for research and development. The Commission found that 7% of unlawful aid measures were incompatible with the common market. This rate was similar to the rate for unlawful aid cases in the industry and services sectors (5%).

(f) Other Member States

A further 25% (155 decisions) of decisions on unlawful aid concerned the other ten EU-15 Member States and less than 2% (11 decisions) four EU-10 Member States (the Czech Republic, Hungary, Poland and Slovakia). In addition to these 11 decisions, the statistics on registered aid cases shows that at the end of December 2006 there were 35 new unlawful aid cases registered for 8 of the EU-10 Member States.

**1.2.5. Trend in the number of decisions on unlawful aid relatively stable since 2003**

In the period 2000-2006, the Commission took on average around 90 decisions per year on unlawful aid measures. The number was higher in the period 2000-2002 due to the impact of the large number of rescue and restructuring cases for former East German companies as well as a relatively high number of decisions on unlawful aid for the fisheries sector in 2002 regarding Italy.

**1.3. Recovery of unlawful aid<sup>17</sup>**

Article 14 (1) of the Procedural Regulation states that *"where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary"*.

- As of 31 December 2006, there were 60 pending recovery decisions, compared to 93 in December 2004 and 71 on 30 June 2006. In the second half of 2006, 14 pending recovery cases were closed, whilst three new recovery decisions were taken (see Table 2). The geographical distribution of pending recovery cases is the following: Spain has the highest number of pending recovery cases (17), which represents 28% of the EU total. However, half of the Spanish pending cases refer to Basque fiscal schemes for which the Commission has initiated Article 88(2) infringement proceedings against Spain for failure to implement the decisions.
- Taken together, Germany, Italy and France account for a further 55% of all pending recovery cases. Germany has reduced its share in the total number of pending cases from 47% in 2004 to 26% in 2006 (mainly as a result of the closure of a large number of old insolvency cases).

It should also be noted that there are no pending cases in 15 of the 25 Member States.

**Table 2: Pending recovery cases by Member State, second semester 2006**

	Situation by	New cases in	Cases closed	Situation by
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<sup>17</sup> Excluding recovery cases in the agriculture sector.

	01/07/2006	2 <sup>nd</sup> semester 2006	in semester 2006	2 <sup>nd</sup> 31/12/2006
<b>Spain</b>	18	0	1	17
<b>Germany</b>	24	0	8	16
<b>Italy</b>	12	0	1	11
<b>France</b>	7	1	2	6
<b>Netherlands</b>	3	1	2	2
<b>Belgium</b>	1	0	0	1
<b>Greece</b>	1	0	0	1
<b>Portugal</b>	1	1	0	2
<b>Ireland</b>	1	0	0	1
<b>Poland</b>	1	0	0	1
<b>Finland</b>	1	0	0	1
<b>Slovakia</b>	1	0	0	1
<b>TOTAL</b>	71	3	14	60

Source: DG Competition

Table 3 provides data on the amounts of aid to be recovered under the 110 recovery decisions adopted since 2000<sup>18</sup>. For 86 of these decisions, relatively accurate information exists on the amount of aid involved. This information shows that the total amount of aid to be recovered on the basis of decisions adopted between 1 January 2000 and 31 December 2006 is at least € 8.7 billion<sup>19</sup>.

**Table 3: Trend in the number of recovery decisions and amounts to be recovered<sup>(°)</sup>  
2000- 2006**

	Date of decision							
	2000	2001	2002	2003	2004	2005	2006	total
Number of decisions adopted	16	20	23	10	23	12	7	111
Total aid known to be recovered (million euro)	247.0	1032.5	1095.4	1015.6	5112.9	38.7	132.6	8674.7
Amounts recovered	225.0	1067.2	1470.1	1230.3	5301.4	4.2	45.3	9343.5
Of which:								
(a) Principal reimbursed/or in blocked Account	17.1	911.2	1037.6	894.6	3155.3	4.1	0.3	6020.2
(b) Aid lost in bankruptcy	207.9	76.3	29.0	0.7	870.9	0.0	45.0	1229.8
(c) Interest		79.7	403.5	335.0	1275.2	0.1	0.0	2093.5
Aid registered in bankruptcy	8.7	16.9	6.2	133.8	0.0	7.5	0.0	173.1
Amount outstanding <sup>(°°°)</sup>	22.0	45.0	28.8	120.3	1086.7	34.6	87.3	1424.7
% still pending to be recovered <sup>(°°)</sup>	8.9%	4.4%	2.6%	11.8%	21.3%	89.4%	66%	16.4%

Notes:

(°) Only for decisions for which the aid amount is known.

<sup>18</sup> On 31 December 2006, there were still a further 8 recovery decisions pending that were adopted before 1 January 2000.

<sup>19</sup> The autumn 2005 State aid Scoreboard (COM(2005)624 final of 9 December 2005) reported a total of €9.4 billion. This discrepancy is due to the fact that some Member States submitted a revised estimate of the amounts to be recovered under some schemes.

(<sup>oo</sup>) Amount excluding interest.

(<sup>ooo</sup>) Total aid known to be recovered less principal reimbursed and aid lost in bankruptcy

Source: DG Competition

For 24 of the recovery decisions adopted since 2000, the Member State concerned has not yet submitted reliable information on the aid amount involved. Most of these decisions (namely 22) concern aid schemes. Especially in relation to fiscal and social security schemes, Member States appear to have difficulties in collecting accurate information (the main reasons given were: large number of beneficiaries; aid granted is partially compatible, which requires a full examination of each individual file; older records are no longer kept). The Commission continues its efforts to obtain information from the Member States on the aid amounts involved.

Of the € 8.7 billion of aid to be recovered under decisions adopted since 2000, some €6 billion of aid (and an additional €2.1 billion of recovery interest) had been effectively recovered by 31 December 2006. This compares to €2.3 billion principal recovered reported in December 2004 and €6 billion reported in December 2005<sup>20</sup>.

The figure of €6 billion represents 71% of the total amount known to be recovered compared with 25% in December 2004. In addition, a further €1.2 billion of unlawful and incompatible aid was “lost” in bankruptcy proceedings<sup>21</sup> and €173 million of illegal and incompatible aid has been registered in ongoing bankruptcy proceedings.

During the second half of 2006 no significant amounts have been recovered and the majority of the cases closed refer to insolvent companies, in which the recovery amount is usually not recovered. Recovery of incompatible state aid is a lengthy process: 10 of the recovery decisions the execution of which was still pending on 31 December 2006 were adopted before 1 January 2000. Of the 110 decisions adopted between 2000 and 2006, only 60 have been closed/are proposed to be closed by the end 2006 (see Table 4).

**Table 4: Trend in the closure of recovery cases**

	Date of the Decision							Total
	2000	2001	2002	2003	2004	2005	2006	
Number of recovery decisions adopted	16	20	23	10	23	12	6	110
Number of these recovery cases that had been closed by 31/12/06:	13	7	15	5	15	3	2	60

Source: DG Competition.

As underlined in the SAAP, the effectiveness and credibility of state aid control presupposes a proper enforcement of the Commission’s decisions. The Commission therefore announced in the SAAP that it will seek to achieve a more effective and immediate execution of recovery decisions, which will ensure equality of treatment of all beneficiaries. To this effect, the

<sup>20</sup> Total amount recovered (including interest and aid lost in bankruptcy reported in December 2004 was €3.1 billion, and €8.2 billion in December 2005).

<sup>21</sup> In insolvency cases, the recovery claim is normally only partially satisfied. The remainder is “lost”. From a competition perspective, however, we consider that the distortion of competition is removed with the liquidation of the beneficiary (provided that its assets are transferred on market terms).

SAAP announces that the Commission will monitor more closely the execution of recovery decisions by Member States. Where Member States do not take all measures available to implement such decisions, the Commission will more actively pursue non-compliance under Articles 88(2), 226 and 228(2) of the EC Treaty.

**Table 5: The pending recovery cases for which the Commission has decided to bring the case before the Court of Justice and for which the illegal and incompatible aid is not yet recovered**

Case number/title	MS	Court case	State of play and recent developments
CR 44/97 – Magefesa	SPAIN	<a href="#">C-499/99</a>	02/07/02: ECJ judgment condemning SPAIN for failing to implement CEC decision
<a href="#">CR 49/98 – Employment measures</a>	ITALY	<a href="#">C-99/02</a>	01/04/04: ECJ judgment condemning ITALY for failing to implement CEC decision
<a href="#">CR 48/99 – CR50/99</a>  <a href="#">CR 52/99 – CR54/99</a>  Basque fiscal aid schemes	SPAIN	<a href="#">C-485/03</a> , <a href="#">C-486/03</a> , <a href="#">C-487/03</a> , <a href="#">C-488/03</a> , <a href="#">C-489/03</a>  <a href="#">C-490/03</a>	14/12/06: ECJ judgment condemning SPAIN for failing to implement CEC decision
<a href="#">CR 03/99 – Spanish shipyards I</a>	SPAIN	<a href="#">C-404/03</a>	26/06/03: ECJ judgment condemning SPAIN for failing to implement CEC decision  18/10/04: Commission sent letter of formal notice to Spain
<a href="#">CR 38/98 – Kimberly Clark/Scott Paper</a>	FRANCE	<a href="#">C-232/05</a>	05/10/06: ECJ judgment condemning FRANCE for failing to execute CEC decision
<a href="#">CR 27/99 – Municipalizzate</a>	ITALY	<a href="#">C-207/05</a>	01/06/06: ECJ judgment condemning ITALY for failing to execute CEC decision
<a href="#">CR 62/00 – Thuringen Porzellan (Kahla)</a>	GERMANY	<a href="#">C-39/06</a>	16/02/05: Commission decision to initiate Art. 88(2) action against GERMANY. 24/01/06: Application lodged at the ECJ pursuant to Article 88(2)

			Press release: <a href="#">IP/05/189</a>
<a href="#">CR 62/03 – Urgent employment measures</a>	ITALY	<a href="#">C-280/05</a>	06/04/05: Commission decision to initiate Art. 88(2) action against ITALY  11/07/05: Application lodged at the ECJ pursuant to Article 88(2)  Press release: <a href="#">IP/05/395</a>
CR <a href="#">58-59-60/00</a> – Basque fiscal aid schemes	SPAIN	<a href="#">C-177/06</a>	21/12/05: Commission decision to initiate Art. 88(2) action against SPAIN 04/04/06: Application lodged at the ECJ pursuant to Article 88(2)  Press release: <a href="#">IP/05/1655</a>
<a href="#">CR 57/03 – Tremonti Bis</a>	ITALY		25/01/06: Commission decision to initiate Art. 88(2) action against ITALY  Press release: <a href="#">IP/06/77</a>
<a href="#">CR 36/01– Beaulieu Ter Lembeek</a>	BELGIUM	<a href="#">C-187/06</a>	25/01/06: Commission decision to initiate Art. 88(2) action against BE 12/04/06: Application lodged at the ECJ pursuant to Article 88(2)  Press release: <a href="#">IP/06/77</a>
<a href="#">CR 8/04 – Fiscal incentives for newly listed companies</a>	ITALY		19/07/06: Commission decision to initiate Art. 88(2) action against ITALY  Press release: <a href="#">IP/06/1040</a>
<a href="#">CR 13/B/2003 - France Telecom-Business Tax Scheme</a>	FRANCE	<a href="#">C-441/06</a>	19/07/06: Commission decision to initiate Art. 88(2) action against FRANCE 25/10/06: Application lodged at the ECJ pursuant to Article 88(2)  Press release: <a href="#">IP/06/1014</a>
<a href="#">CR57/02 - Exonérations fiscales en faveur de la reprise d'entreprises en difficulté - Article 44 septies CGI</a>	FRANCE	<a href="#">C-214/07</a>	24/10/06: Commission decision to initiate Art. 88(2) action against FRANCE  Press release: <a href="#">IP/06/1471</a>

<a href="#">C11/04 - Olympic Airways</a>	GREECE		26/04/06 Commission decision to initiate Art. 88(2) action against GREECE  Press release: <a href="#">IP/06/531</a>
<a href="#">C19/02 - Olympic Airways</a>	GREECE	<a href="#">C-415/03</a>	26/04/06: Commission decision to initiate Art 228 action against GREECE failure to comply with judgement of Court of Justice (case C-415/03)  Press release: <a href="#">IP/06/531</a>
<a href="#">CR 81/97 – Social security reductions – Venezia e Chioggia</a>	ITALY		10/05/07: Commission decision to initiate Art. 88(2) action against ITALY  Press release: <a href="#">IP/07/648</a>

#### 1.4. Negative decisions without recovery

While Article 14(1) of the Procedural Regulation provides that a Member State shall recover unlawful aid from the beneficiary, it also states that the Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law. This is mostly the case when legitimate expectations are involved.

In the period 2000-2006, the Commission refrained from ordering recovery in 18 decisions concerning measures in the industry and services sectors, of which 14 related to schemes and 2 to *ad hoc* aid cases. With regard to all 16 schemes concerned, the Commission restored the level playing field of competition for the future by ordering the Member State concerned to abolish the measure by a certain date.

Among the measures in which the Commission did not order recovery are nine cases<sup>22</sup> concerning the Belgian schemes for coordination centres granting fiscal privileges to undertakings providing intra-group services for multinational undertakings<sup>23</sup>. This scheme dates back to 1984 at which time the Commission considered that it didn't involve state aid within the meaning of Article 87(1) of the EC Treaty. Following the Council's initiative on the Code of conduct on business taxation<sup>24</sup>, the Commission revised the functioning of this regime and, on 11 July 2001, proposed to Belgium to align it with the state aid rules. After Belgium refused to do so in February 2002, the Commission took a negative decision<sup>25</sup> in 2003 ordering Belgium to discontinue the scheme, closing it immediately to new entrants and phasing it out with respect to existing beneficiaries not later than 31 December 2010. However, since the Commission had initially raised no objections in relation to this scheme, it

<sup>22</sup> C 45/2001, C 46/2001, C 47/2001, C 48/ 2001, C 49/2001, C 50/2001, C 51/2001, C 54/2001 and C 30/2002.

<sup>23</sup> SG(84) D/6421 of 16 May 1984.

<sup>24</sup> See ECOFIN conclusions of 1 December 1997 including a package of three initiatives aimed at tackling harmful tax competition.

<sup>25</sup> Case C15/2002 - OJ L282 of 30 October 2003

constituted an existing aid scheme, which could only be modified for the future. The beneficiaries were thus not required to pay back any advantage they had received in the past. A number of Member States (France, Germany, Ireland, Luxembourg, the Netherlands and Spain), relying on the initial Commission decision regarding the Belgian scheme, had adopted schemes similar to the Belgian one. In view of the legitimate expectations created by the Belgian scheme, the Commission took a similar approach in these cases and did not require recovery of the advantages granted in the past.

In the France Télécom (hereinafter, FT) case<sup>26</sup>, the ERAP's<sup>27</sup> offer to provide a shareholder's advance amounting to €9 billion, placed in the context of the French government statements made from July to September 2002, which clearly helped maintain FT's investment rating, was considered to be state aid. However, in so far as the aid depends on conduct which preceded the notification of the shareholder loan proposal, a diligent operator could have had confidence in the lawfulness of the conduct of the Member State concerned. The Commission therefore concluded that ordering the aid's recovery would have been contrary to the general principles of Community law.

In other cases the decision not to order the recovery of aid related to completely different reasons. In the case of the German financial measures in favour of Ingenieur- und Gewerbebau GmbH<sup>28</sup> (IGB) the beneficiary company was dissolved by order of the local court on account of a lack of assets and any continuation of its activities in any form whatsoever was ruled out. Therefore, the Commission concluded that a recovery order would serve no purpose.

## **1.5. Tackling unlawful aid**

### **1.5.1. *The role of Member States***

The SAAP has stressed the need to strengthen the commitment of Member States to their obligation to enforce the state aid rules<sup>29</sup>. Member States are indeed responsible for the respect of their obligations under the EC Treaty disregarding problems caused, for instance, by national administrative structures (centralised v. decentralised Member States) or by national legislation. Each of the specific obligations established by the EC Treaty is, in addition, reinforced by the general duty of loyal co-operation established in Article 10 of the EC Treaty.

Coordination, advice and supervision/scrutiny of state aid issues in the different Member States seem to be organised around one of the following three models:

- (1) They are fully integrated into the governmental structure of the country.
- (2) They are part of the competences of the National Competition Authorities.

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<sup>26</sup> C 13a/2003 (ex NN 779/2002) – Financial measures put in place by the State in support to France Télécom. Final negative decision published in OJ L 257 of 20 September 2006, p. 11.

<sup>27</sup> ERAP is a state-owned industrial and commercial establishment. Its mission is to acquire, at the request of the French government, equity interests in companies in the energy, pharmaceutical and telecommunications sectors.

<sup>28</sup> State aid case C 66/2001 (ex NN 2/2000). Final negative decision published in OJ L 314 of 18 November 2002, p. 72.

<sup>29</sup> See point 17 of the SAAP.

(3) They are dealt with by independent monitoring authorities.

Apart from the Danish Competition Authority (Konkurrencestyrelsen) and the UK Office of Fair Trading, only the National Competition Authorities of some of the new EU-10 Member States seem to have competences in the field of state aid. All EU-10 Member States had, as part of their legal obligations under the European Agreements, to set up independent authorities for state aid control in the years prior to accession. The experience was largely positive and in a number of cases these authorities have retained certain coordination functions after accession to the EU in May 2004.

In the Czech Republic, for instance, the Office for the Protection of Competition (UOHS) cooperates with state aid providers in both notifying the state aid to the Commission and in the process of granting the state aid as such, it keeps a register of state aid provided in the country and submits to the Commission the annual report on state aid.

Another good example can be found at the Cypriot Office of the Commissioner for State aid control whose main role is to monitor its correct implementation by the Republic of Cyprus of the Community state aid law "*whose objective is the maintenance and strengthening of competition in the internal market, for the benefit, mainly, of European consumers*"<sup>30</sup>. This includes carrying out *ex ante* and interim evaluations of the effectiveness and impact of the different state aid measures aiming at reducing and re-orientating their State aid expenditure.

Some interesting developments are also taking place in countries such as Spain where a draft of a new law for the protection of competition ("*Ley de defensa de la competencia*") is currently under study in the National Parliament. The draft foresees the creation of an independent competition authority, "the National Competition Commission (NCC)", which would eventually include a state aid unit with more proactive possibilities to act in the state aid field<sup>31</sup> without interfering with the Commission's exclusive powers concerning the compatibility assessment of state aid measures. The competences of such a unit should focus on the analysis, from a competition point of view, of the criteria for granting aid with the objective of drafting reports and making recommendations to the granting authorities. To this end, the draft law sets up a number of information obligations from the various levels of administration (national, regional, local) to the NCC.

Recently, the ECJ judgement in the "Scott case"<sup>32</sup> has also emphasized the Member States' responsibilities regarding the recovery of unlawfully granted aid. In this case, France was condemned for failure to execute a Commission recovery decision because of its national legal system and not because of its behaviour. The ECJ insists that the repayment of the aid has to take place without delay and that recovery must be immediate. It stresses that the time-frame within which the aid must be recovered is indeed essential in order to ensure the re-establishment of the *ex ante* situation in the market. National procedures providing for an automatic suspensory effect of actions brought against recovery orders and preventing the immediate restoration of the previously existing situation, thereby prolonging the unfair competitive advantage resulting from unlawful and incompatible aid, are against the principle of effectiveness laid down in Article 14(3) of the Procedural Regulation and should be left

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<sup>30</sup> See the webpage of the Office of the Cypriot Commissioner for State aid control ([http://www.publicaid.gov.cy/publicaid/publicaid.nsf/dmlindex\\_en/dmlindex\\_en?opendocument](http://www.publicaid.gov.cy/publicaid/publicaid.nsf/dmlindex_en/dmlindex_en?opendocument)).

<sup>31</sup> See Article 11 of the draft Spanish law for the protection of competition ("*Proyecto de Ley de defensa de la competencia*").

<sup>32</sup> See ECJ judgement of 5 October 2006 in case C-232/05, *Commission v. France*.

unapplied. It is against this double benchmark (concrete and immediate recovery) that the Commission will assess the actions taken by Member States to execute Commission recovery decisions.

### ***1.5.2. The role of competitors and other interested parties and the role of national courts***

As the last sentence of Article 88(3) of EC Treaty has direct effect<sup>33</sup>, individuals have the possibility to invoke it before national courts which have to draw all the consequences of the illegality of the aid including, eventually, ordering its recovery<sup>34</sup>. It has to be borne in mind that neither the initiation of a procedure by the Commission (be it under Article 88(2) or (3) of the EC Treaty) relieves national courts of their duty to safeguard rights of individuals in case of breach of the notification obligation<sup>35</sup> nor has the final Commission decision the effect of regularising *ex post* the illegality of the aid<sup>36</sup>.

The Commission has repeatedly stressed the importance of making use of this possibility for private enforcement of the state aid rules<sup>37</sup>.

The SAAP has also underlined the need to increase transparency and advocacy about state aid policy to allow undertakings, the academic world, competition specialists, consumers and the broader public to get involved and act against unlawful aid, in particular before national judges, as well as the need to raise awareness of company auditors, national market regulators and national Courts of Auditors<sup>38</sup>.

A study recently carried out by a group of experts on behalf of the Commission on enforcement of state aid law at national level<sup>39</sup> concluded that: (1) European companies increasingly rely on state aid law to obtain the annulment of a discriminatory imposition of a financial burden from which another company is exempted or where the tax or levy is used to finance unlawful aid, but (2) companies rarely use state aid rules as an instrument to challenge the distortion of competition and trade caused by unlawful subsidies granted to competitors. The conclusions of the study also point to the fact that too often excessively long administrative and judicial procedures at national level result in unacceptable delays in the recovery of unlawful aid.

According to the same study, the main impediments to effective enforcement of state aid law in national courts is not to be found in shortcomings or inefficiencies in the Member States' legal systems or to a lack of knowledge of EC law by national judges. Instead, the study

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<sup>33</sup> See ECJ judgement of 15 July 1964 in case 6/64, *Flaminio Costa v. ENEL*, Rec. 1964, p. 585.

<sup>34</sup> See ECJ judgement of 11 December 1973 in case 120/73, *Gebrüder Lorenz GmbH v. Germany*, Rec. 1973, p. 1471.

<sup>35</sup> See ECJ judgement of 11 July 1996 in case C-39/94, *Syndicat Français de l'Express International (hereinafter, SFEI) v. La Poste*, Rec. 1996, p. I-3547.

<sup>36</sup> See ECJ judgement of 29 November 1991 in case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires et Syndicat National des Négociants et Transformateurs du Saumon v. France*, Rec. 1991, p. I-5505.

<sup>37</sup> See Notice on cooperation between national courts and the Commission in the State aid field. OJ C 312 of 23 November 1995, p.8.

Point 56 of the SAAP announces a possible revision of this Notice, which would focus particularly on the need to extend it to other national bodies.

<sup>38</sup> See points 17 and 55 of the SAAP.

<sup>39</sup> JESTAEDT, T., DERENNE, J. and OTTERVANGER, T. (Coord.). Study on the enforcement of state aid law at national level. Competition studies 6, OPOCE. Luxembourg, March 2006. Please note that this study covers only EU-15.

argues that the diversity of the procedures available in Member States for private parties for the enforcement of state aid law and the legal uncertainties relating to these procedures (in particular *locus standi*, availability of interim relief, burden of proof, causation and unclear substantive rules) may discourage private parties to enforce state aid law before national courts.

This means that, despite a growing awareness of state aid rules at national level – both within the business community and in the legal professions – this tool is not yet fully effective to properly tackle the unlawful aid problem<sup>40</sup>.

### **1.5.3. The role of the European Commission**

The Commission, in its role of guardian of the Treaties<sup>41</sup>, can initiate unlawful aid procedures based either on *ex officio* investigations or on information received from competitors and/or other interested parties who have, according to Article 20(2) of the Procedural Regulation, the right to submit information on the alleged unlawful aid to the Commission.

According to the Procedural Regulation<sup>42</sup>, the procedure for the Commission to deal with unlawful aid is similar to the one applicable to notified aid. The main difference concerns the absence of deadlines (both for completing the first-phase investigation and for adopting a final decision after opening of formal investigation proceedings according to Article 88(2) of the EC Treaty) which is explained by the absence of notification. Besides, as further explained below, the Commission has the possibility to adopt interim measures in the form of information, suspension and recovery injunctions.

#### (a) Fight against the ongoing distortion of competition and trade

The "suspension injunction" foreseen in Article 11(1) of the Procedural Regulation provides for the Commission possibility to require a Member State to suspend unlawful aid until the Commission has taken a decision on the compatibility of aid with the common market. In practice, the suspension injunction is rarely used. The most recent example<sup>43</sup> of the use of this tool dates from 2005 when the Commission required Greece to suspend further granting of unlawful state aid in the form of tax breaks under the Greek Law 3220/2004, which reduced the tax base of many companies in various sectors by 35% of their profits. This law was never notified to the Commission in clear breach of Article 88(3) of the EC Treaty. The Commission requested Greece to immediately suspend the granting of state aid, even before reaching a final decision on the compatibility of the measure in order to prevent the distortion of competition and trade in the internal market from continuing. Greece complied with the Commission's decision by suspending the possibility for companies to derive further benefits from the reserve fund until the Commission has reached a final decision on the case.

The "recovery injunction" foreseen in Article 11(2) of the Procedural Regulation enables the Commission to request a Member State to provisionally recover unlawful

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<sup>40</sup> Even though the number of cases increased substantially (from 116 to 386) only in very few cases the action brought by a competitor before a national court resulted in the actual suspension or recovery of an unlawful aid.

<sup>41</sup> See Article 211, first indent, of the EC Treaty.

<sup>42</sup> See Recitals 11 to 14 and Chapter III (Articles 10 to 15) of the Procedural Regulation.

<sup>43</sup> See state aid case C 37/2005 (ex NN 11/2004) – Tax exempt reserve fund. Decision to open formal investigation proceedings published in OJ C 20 of 27 January 2006, p. 16. No final decision has been adopted yet.

aid until the Commission has taken a decision on its compatibility. The adoption of such a decision requires that three cumulative conditions are fulfilled: (1) according to established practice, inexistence of doubts about the aid character of the measure concerned, (2) urgency to act, and (3) serious risk of substantial and irreparable damage to a competitor. The imposition of these conditions makes the application of recovery injunction difficult in practice and, consequently, the Commission has not used this tool yet.

(b) Restoration of the ex ante competitive situation

The "negative decision with recovery" foreseen in Article 14 of the Procedural Regulation provides that, if the unlawful aid is found to be incompatible with the common market, the Commission shall request a Member State to recover the aid from the beneficiary unless that would be contrary to a general principle of law. The recovery shall take place without delay and according to national procedures. Member State concerned must, therefore, take all necessary measures to ensure the effectiveness of the Commission decision to recover the aid. The powers of the Commission to recover aid will be subject to a limitation period of ten years<sup>44</sup>.

The SAAP insists on the fact that 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. However, experience shows that the implementation of recovery decisions by Member States is still far from being satisfactory and, therefore, the Commission should continue to seek to achieve a more immediate and effective execution of recovery decisions, which will ensure equality of treatment of all beneficiaries. In line with the measures announced in the SAAP<sup>45</sup> the Commission is monitoring more closely the execution, in accordance with national procedures, of recovery decisions by Member States. And, where it appears that recovery is not carried out in an immediate and effective manner, the Commission is more actively pursuing non-compliance under Articles 88(2), 226 and 228 of the EC Treaty<sup>46</sup>.

A clear and recent example of this stricter approach can be found in the Olympic Airways case. In December 2002 the Commission found that Greece had misused an aid examined and approved by the Commission in the nineties and that, in addition, Olympic Airways had received new aid which was not duly notified. Consequently, the Commission ordered Greece to recover all the aid granted after 14 August 1998. Since Greece didn't comply with this order, the Commission decided, in April 2003, to make use of its powers under Article 88(2) of the EC Treaty and bring the matter before the ECJ. On 12 May 2005, the ECJ<sup>47</sup> confirmed that the Greek authorities had failed to recover from the airline a state aid estimated in at least € 161 million. Greece didn't respect this judgement either and in October 2006 the Commission adopted, according to Article 228 of the EC Treaty, a decision requesting the ECJ to impose a lump sum penalty of €10 512 per day since the 2005 judgement and until the effective implementation by Greece of the 2002 decision. Moreover, in case this decision would still not be fully implemented by the time the ECJ issues its second

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<sup>44</sup> See Article 15 of the Procedural Regulation.

<sup>45</sup> See point 53, first indent, of the SAAP.

<sup>46</sup> For further details, see Table 5 of this report.

<sup>47</sup> ECJ judgement of 12 May 2005 in case C-415/03, Commission v. Greece.

judgement, the Commission has also requested to the ECJ to impose on Greece a periodic penalty payment of €53 611 per day from the day of this second judgement and until the effective implementation of the original decision is carried out. The case is still pending.

In the same line, the use of the so-called *Deggendorf* case-law<sup>48</sup> has also been reinforced. This case law confirmed that, when assessing a new aid measure, the Commission has the power to take into account the fact that the beneficiary of this new aid has not fully repaid earlier unlawful and incompatible aid that was subject of a recovery decision. In such cases the Commission may eventually decide that the, otherwise compatible, aid cannot be paid out as long as the previous aid has not been fully reimbursed. It constitutes, therefore, an additional means to put pressure both on Member States and beneficiaries to comply with recovery decisions.

However, between 1997 and 2005 the *Deggendorf* case-law was applied only occasionally in relation to individual aid cases. But in 2005, in line with the measures announced in the SAAP, the Commission decided to start applying it in a strict and systematic way and to extend its scope of application by:

- (1) Applying the *Deggendorf* principle to legal entities other than the beneficiary of aid in cases where the beneficiary of new aid belongs to the same "economic unit"<sup>49</sup> as the beneficiary of the old aid and there are clear indications of a possible circumvention of the *Deggendorf* case-law.
  - In March 2005 the Commission authorised an environmental aid to a district heating project in Rome<sup>50</sup>. The beneficiary of this aid was AceaElectrabel Produzione SpA (hereinafter, AEP), a firm jointly controlled by ACEA and Electrabel. ACEA, an energy company controlled by the Municipality of Rome, previously benefited from an aid that the Commission declared to be unlawful and incompatible in 2002 and that, two years later, was not recovered by the Italian authorities. Consequently, the Commission decision established that the new compatible aid could not be paid until the beneficiary, who was part of the ACEA group, had reimbursed the old aid.

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<sup>48</sup> CFI judgement of 13 September 1996 in joined cases T-244/93 and T-486/93, *Textilwerke Deggendorf GmbH* (hereinafter, TWD) versus Commission, Rec. 1995, p. I-2265; ECJ judgement of 15 May 1997 in case C-355/95 P, *TWD versus Commission*, Rec. 1997, p. I-2549.

In 1995, the Commission adopted a decision in which it ordered the German authorities to suspend the payment of new compatible aid to TWD until they had completed the recovery of an old unlawful and incompatible aid from that company. This decision was upheld by the CFI and the ECJ. In its judgement the CFI confirmed that "*When the Commission considers the compatibility of a State aid with the common market, it must take all the relevant factors into account including, where relevant, the circumstances already considered in a prior decision and the obligations which that previous decision may have imposed on a Member State. It follows that the Commission had the power to take into consideration, first, any accumulated effect of the old[...] aid and the new [...] aid and, secondly, the fact that the (old) aid declared unlawful [...] had not been repaid*" (see point 56 of the above mentioned CFI judgement).

<sup>49</sup> Cases where for instance the beneficiary of the new aid is a newly created legal entity controlled by the beneficiary of the old unlawful aid.

<sup>50</sup> See state aid case C 35/2003 (ex N 90/2002) – Reduction of greenhouse gas emissions (Lazio). Final conditional decision published in OJ L 244 of 7 September 2006, p. 8.

- On 3 August 2005 AEP brought an action for annulment before the CFI<sup>51</sup> against the Commission decision on the grounds that, among other considerations, the beneficiary of the new aid measure is not the same and does not constitute a single economic entity with the beneficiary of the old aid and, therefore, the order to suspend the payment of the new aid appears to be unjustified. The case is still pending.
- (2) Including in the new notification forms<sup>52</sup> a Deggendorf clause which request Member States to indicate whether, in case of individual aid, "any potential beneficiary of the measure received state aid which is subject of an outstanding recovery order by the Commission".
  - (3) Going from affecting only individual or *ad hoc* measures to including aid schemes as well, through the insertion in the decisions approving new aid schemes of a commitment by the Member State affected to suspend the payment of aid under the new scheme to any undertaking that has benefited in the past from unlawful and incompatible aid (be it individual aid or aid scheme) and this until the Member State has verified that such enterprise has complied fully with the outstanding recovery decision<sup>53</sup>.
  - (4) Incorporating the *Deggendorf* principle in new legislative texts (i.e., rescue and restructuring guidelines<sup>54</sup>, block exemption regulation on regional aid<sup>55</sup>, etc.).

Finally, in order to improve and speed-up the execution of its recovery decisions, the Commission is preparing a notice<sup>56</sup> recalling the principles underlying the recovery policy and setting out on the one hand the measures taken by the Commission to facilitate the execution of recovery decisions and, on the other hand, the actions that Member States could take to ensure that they reach full compliance with the rules and principles as established by the body of European law and, in particular, the case law of the Community Courts.

## 2. PART TWO: LEGISLATIVE DEVELOPMENTS

### 2.1. State Aid Action Plan

The Commission continues to implement various aspects of the State aid Action Plan (SAAP)<sup>57</sup>, which set out in June 2005 the guiding principles for a comprehensive reform of State aid rules and procedures over the next five years. Since the last Scoreboard was

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<sup>51</sup> Case T-303/05.

<sup>52</sup> See point 11 of Part I – General Information of Annex I to Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (hereinafter, the Implementing Regulation). OJ L 140 of 30 April 2004, p. 14.

<sup>53</sup> See, as a matter of example, state aid cases N 410/2005, N 610/2005, N 620/2005, N 9/2006, N 264/2006, N 291/2006 and N 390/2006.

<sup>54</sup> See point 2.5 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty. OJ C 244 of 1 October 2004, p. 5.

<sup>55</sup> See Recital 13 and Article 7(g) of Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid. OJ L 302 of 1 November 2006, pp. 31 and 36.

<sup>56</sup> The adoption of this notice is foreseen for the end of 2007.

<sup>57</sup> COM(2005) 107 final of 7 June 2005, [http://europa.eu.int/comm/competition/state\\_aid/others/action\\_plan/](http://europa.eu.int/comm/competition/state_aid/others/action_plan/)

published in the autumn, the Commission has adopted the following final or draft legislative texts:

## **2.2. Prolongation of Shipbuilding Framework**

In October 2006, the Commission decided to prolong the Framework on state aid rules for shipbuilding by two years, until 31 December 2008<sup>58</sup>. The prolonged Framework, which came into force at the beginning of 2004 takes into account the characteristics of the shipbuilding industry, including provisions about the use of aid for innovation which are unique in EU state aid law. Given the limited period of application of these rules, the Commission wants to acquire more experience before deciding on the future of these rules. The Framework contains specific provisions on innovation aid regional aid, closure aid, export credits, development aid and employment aid that reflect the specific characteristics of the shipbuilding industry and market.

## **2.3. New rules on State aid in agricultural sector**

The Commission adopted in December 2006 new rules on the granting of State aid in the agricultural sector. These rules are in two parts: an exemption regulation<sup>59</sup> which exempts Member States from the obligation to notify State aid given to small and medium-sized undertakings involved in agricultural production provided that certain requirements are met, and guidelines<sup>60</sup> which complement the regulation and lay down rules applicable to notified aid. The two documents cover the period 2007 to 2013. The new categories of aid included in the new guidelines include aid for compliance with standards, "Natura 2000" aid and aid relating to the payments provided for in Directive 2000/60/EC (water policy), aid relating to exemption from excise duties as provided for in Directive 2003/96/EC (taxation of energy products and electricity) and aid to the forestry sector. As regards the processing and marketing of agricultural products, the granting of State aid will from now on be governed by the provisions applicable to State aid in the industrial sector. The exemption regulation will make it possible for aid to be granted to farmers faster, which is particularly important, for example, where they sustain losses due to bad weather or animal or plant diseases.

## **2.4. Commission Regulation on *de minimis* aid**

In December 2006, the Commission adopted a new *de minimis* Regulation<sup>61</sup> exempting small subsidies from the obligation to notify them in advance for clearance by the Commission under EC Treaty state aid rules. Under the new Regulation, aid of up to EUR 200 000 and up to EUR 100 000 for the road transport sector, granted over any period of three fiscal years will not be considered as state aid. Loan guarantees will also be covered to the extent that the guaranteed part of the loan does not exceed EUR 1.5 million. In order to avoid abuses, forms of aid for which the inherent aid amount cannot be calculated precisely in advance (so-called 'non-transparent' aids) and aid to firms in difficulty have been excluded from the Regulation.

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<sup>58</sup> Commission communication concerning the prolongation of the Framework on State aid to shipbuilding - adopted by the Commission on 24 October 2006. OJ C 260 of 28 October 2006, p. 7.

<sup>59</sup> Commission Regulation (EC) No 1857/2006, of 15 December 2006, on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001. OJ L 358 of 16 December 2006, p. 3.

<sup>60</sup> Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013. OJ C 319 of 27 December 2006, p. 1.

<sup>61</sup> Commission Regulation (EC) No 1998/2006 of the 15<sup>th</sup> December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid. OJ L 379, 28.12.2006.

The Regulation took account of comments received from a series of public consultations in the course of 2006. The Regulation entered into force on 1 January 2007.

## **2.5. Prolongation of block exemption regulation**

The Commission adopted in December 2006 a Regulation<sup>62</sup> to extend until 30 June 2008, the period of application of Regulations (EC) No 2204/2002 on State aid for employment, (EC) No 70/2001 on State aid for small and medium sized enterprises and (EC) No 68/2001 on training aid. The prolongation of the validity of these regulations is sought to allow for the necessary period of preparation of a future single block exemption Regulation, which will regroup the current regulations and possibly add other areas, as announced in the State Aid Action Plan.

## **2.6. Prolongation of Cinema Communication**

The Commission adopted in June 2007 a Communication<sup>63</sup> extending until 31st December 2009 at the latest the application of the current rules on state aid to cinematographic and other audiovisual works. This Communication extends the rules laid down Cinema Communications of 2001 and 2004. As announced in 2004, when the Communication was renewed, a study on the economic and cultural impact of territorialisation clauses, obliging producers to spend a certain proportion of the film budget (currently up to 80%) in the Member State granting the aid, was launched. The final study results are expected at the end of 2007, and will be used as an input for the future revision of the rules.

## **2.7. Commission Draft Regulation on *de minimis* aid in the fisheries sector**

In June 2006, the European Commission has adopted a draft Regulation on *de minimis* aid in the fisheries sector. Under the new Regulation, which would apply only to the fisheries sector, the ceiling would be set at €30 000 per three-year period, per beneficiary, on condition that the total amount of such aid represents less than 2.5% of the annual national fisheries output. None of this aid may be used to purchase or construct new vessels or to enhance existing fleet capacity. Member States have to record all relevant information to show that these conditions have been respected. The draft Regulation has been discussed with Member States and then published in the Official Journal C 276 dated 14.11.2006, to invite stakeholders to submit comments. The regulation is due to be adopted by the Commission in July 2007.

## **2.8. Commission draft Regulation on raising the ceiling for *de minimis* aid in the agriculture sector**

In April 2007 the Commission adopted a draft Regulation raising the ceiling for small amounts of aid ("*de minimis*" aid) in the agriculture sector to €6 000 per beneficiary over any period of three years and the maximum total per Member State to 0.6% of the value of agricultural output. It also sets out a clearer definition of the scope of such aid. The draft Regulation gives the Member States greater room for manoeuvre in granting aid without

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<sup>62</sup> Commission Regulation (EC) No 1976/2006, of 20 December 2006, amending Regulations (EC) No 2204/2002, (EC) No 70/2001 and (EC) No 68/2001 as regards the extension of the periods of application (Prolongation of existing State aid block exemptions). OJ L 368 of 23 December 2006, p. 85.

<sup>63</sup> Prolongation of the Cinema Communication, adopted by the European Commission on 13 June 2007, Press release [IP/07/820](#)

distorting competition. At present, under the Regulation<sup>64</sup> adopted in October 2004, aid in the agriculture sector not exceeding €3 000 per beneficiary over any period of three years or 0.3% of the value of agricultural output for each Member State is deemed not to distort or threaten to distort competition. The draft regulation will first be discussed with the Member States then published in the Official Journal to invite stakeholders to make their comments. After that the Member States will again be consulted on the text. Following this wide-ranging consultation exercise and taking account of the comments received, the Commission intends to adopt a definitive regulation towards the end of the year.

## **2.9. Draft Community guidelines on State aid for environmental protection**

The current Community guidelines on State aid for environmental protection<sup>65</sup> expire at the end of 2007. The Commission services have launched the revision of these guidelines, by publishing a first draft of the revised guidelines on DG Competition's web site<sup>66</sup> in May 2007. This draft is available for public consultation and comments from interested stakeholders, and will be the subject of a multilateral discussion with Member States. The final adoption of the revised Environmental guidelines is envisaged by the end of this year.

## **2.10. Proposal for a Commission Regulation amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty**

The Commission approved the proposal for modification of Regulation 794/2004<sup>67</sup> in June 2007. The proposal will be published on DG Competition's web site and will be subject to discussion with the Member States in the Advisory Committee on State aid. The final adoption of a Commission Regulation amending Regulation (EC) 794/2004 is envisaged by the end of 2007. The proposed amendments concern primarily the transmission of State aid notifications, the method of calculation of interest rate for the recovery of unlawful aid and the update of notification forms for R&D&I and risk capital aid measures.

## **2.11. Commission report on State aid to the coal industry**

The Regulation on State aid to the Coal industry<sup>68</sup> requires the European Commission to present a report on its application by the end of December 2006. Based on the conclusions of the Report, the Commission may then propose amendments to the Regulation. As the Regulation expires at the end of 2010, the Report also offers the Commission the opportunity to give first indications as to its view on State aid to the Coal industry after this date.

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<sup>64</sup> Regulation (EC) No 1860/2004, of 6 October 2004. OJ L 325 of 28 October 2004, p. 4.

<sup>65</sup> [Community guidelines on State aid for environmental protection](#), Official Journal C 37, 03.02.2001, pages 3-15

<sup>66</sup> Draft Community guidelines on environmental protection, published on 10 May 2007, [http://ec.europa.eu/comm/competition/state\\_aid/reform/guidelines\\_environment\\_en.pdf](http://ec.europa.eu/comm/competition/state_aid/reform/guidelines_environment_en.pdf)

<sup>67</sup> OJ L 140, 30.4. 2004, p.1. Regulation as last amended by Regulation No 1935/2006, OJ L 407, 30.12. 2006, p.1.

<sup>68</sup> Council Regulation (EC) No 1407/2002 of 23 July 2002 on State aid to the coal industry, OJ L 205, 02/08/2002 P. 0001 – 0008, [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=302R1407](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=302R1407)

The Commission has adopted its report<sup>69</sup> on 21 May 2007. The report finds that there are important differences in the competitive situation of coal mines in Europe. Whereas mines in Germany, Spain, and Hungary have production costs of more than twice the world market price for coal, and are therefore dependent on operating aid, mines in the Czech Republic, Poland, Great Britain and Slovakia are more or less competitive on the world market. These mines receive either no subsidies at all or subsidies for new investments and/or mitigating inherited liabilities only. The Report describes the changes to State aid policies which took place in the Member States since the Coal Regulation came into force. It focuses particularly on types of aid which were introduced by the Member States and the results of the restructuring processes conducted in the Coal sector with the use of subsidies. The Report also provides an overview of the impact of State aid to the Coal industry on the internal market, namely on the production of coal, electricity, coke and steel.

In view of the fact that the global coal market appears to function efficiently the Report concludes that it is not necessary to propose amendments to the Coal Regulation for the period 2008 to 2010. The Coal Regulation will expire on 31 December 2010. The Commission Report invites the Parliament, the Council, the Economic and Social Committee, the Committee of the Regions and all stakeholders concerned to provide their input on the Report.

## **2.12. Regional aid maps 2007-2013 approved for 25 Member States**

By the end of March 2007 the Commission had approved under EC Treaty State aid rules the regional aid maps covering the period 2007-2013 for 25 Member States. Two remaining EU Member States (Italy and The Netherlands) are unable to grant any regional aid within their territory until a new map has been approved by the Commission<sup>70</sup>. These decisions form part of a wider exercise to review regional aid systems in all Member States. A regional aid map defines the regions of a Member State eligible for national regional investment aid for large enterprises under EC Treaty state aid rules and establishes the maximum permitted levels of such aid in the eligible regions. The adoption of a regional aid map is a pre-condition to ensure the continuity of the regional policy and Structural Fund programmes as from January 2007, as the validity of all previous maps expired on 31<sup>st</sup> December 2006.

## **3. PART THREE: AID AWARDED UNDER THE STATE AID BLOCK EXEMPTION REGULATIONS**

With a view to reducing the administrative burden for specific types of aid, block exemptions for aid to SME, training aid, employment aid, certain types of aid in the fisheries sector and aid to SME in the agricultural sector have come into force over the past few years<sup>71</sup>. Initial

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<sup>69</sup> [Commission Report on the Application of Council Regulation \(EC\) No 1407/2002 on State Aid to the Coal Industry](#), COM2007(253), 21.05.2007, [http://ec.europa.eu/dgs/energy\\_transport/state\\_aid/doc/com\\_2007\\_0253\\_en.pdf](http://ec.europa.eu/dgs/energy_transport/state_aid/doc/com_2007_0253_en.pdf)

<sup>70</sup> The Netherlands notified their regional aid map in May 2007. Italy has not yet notified its map.

<sup>71</sup> Commission Regulation (EC) No 70/2001, of 12 January 2001, on State aid to SME – OJ L 10 of 13 January 2001, p. 33. Commission Regulation No 364/2004, of 25 February 2004, amending Regulation (EC) No 70/2001 as regards the extension of its scope to include aid for research and development – OJ L 63 of 28 February 2004, p. 22. Commission Regulation (EC) No 68/2001, of 12 January 2001, on training aid – OJ L 10 of 13 January 2001, p. 20). Commission Regulation No 363/2004, of 25 February 2004, amending Regulation (EC) No 68/2001 – OJ L 63 of 28 February 2004, p. 20. Commission Regulation (EC) No 2204/2002, of 5 December 2002, on State aid for employment – OJ L 337 of 13 December 2002, p. 3. Commission Regulation (EC) No 1/2004, of 23 December 2003, on State aid to SME in the

results are positive: the number of measures being notified for these types of aid has fallen considerably since 2001 as Member States make increasing use of the possibilities offered by the block exemption regulations. By the end of 2006, Member States had informed the Commission that they implemented almost 1700 block exempted measures since the introduction of the regulations for SME and training in 2001 (see Table 6). In 2006 alone, the Commission received more than 400 summary information forms on newly introduced block exempted measures: 183 on aid for SME primarily in the industry and services sectors, a further 119 for SME in the agricultural sector, 57 on training aid, 35 on aid to employment, and 24 for exempted aid in fisheries. While the number of forms submitted by the Member State in 2006 remained stable, the use of employment and agriculture block exemption regulations has increased.

Four Member States, Italy (25% of the total number of measures), the United Kingdom (21%), Germany (13%) and Spain (10%) accounted almost for 70% of all the information forms submitted 2001-2006. The number of measures submitted by some of the EU-15 Member States is rather low: less than 20 in total in Denmark, Finland, Ireland, Luxembourg, Portugal and Sweden. The EU-10 Member States accounted for more than 24% of the measures submitted in 2006. In the agricultural sector, the possibility to exempt aid, introduced in 2004, has been taken up by 17 of the 25 Member States, in the fisheries sector this possibility, introduced end of 2004, was used by 11 Member States.

**Table 6: Trend in the number of measures for which information forms were submitted under the State aid block exemption regulations, 2001-2006, EU-25**

Type of State aid block exemption	Year						Total number
	2001	2002	2003	2004	2005	2006	
<b>SME</b>	102	123	139	149	197	183	893
<b>Training</b>	48	80	55	79	68	57	387
<b>Employment</b>	-	0	8	21	26	35	90
<b>Agriculture</b>	-	-	-	72	88	119	279
<b>Fish</b>	-	-	-	1	22	24	47
<b>Total</b>	150	203	202	322	401	418	1696

Note: The table excludes cases withdrawn. Figures for the EU-10 are included as of 1 May 2004. Source: DG Competition

**Table 7: Number of measures by Member State for which information sheets were submitted under the State aid block exemption regulations, 2001-2006**

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agricultural sector – OJ L 1 of 03 January 2004, p. 1. Commission Regulation (EC) No 1595/2004, of 8 September 2004, on State aid to SME active in the production, processing and marketing of fisheries products – OJ L 291 of 14 September 2004, p. 3.

Member State	Type of block exemption regulation					Total number
	SME	Training	Employment	Agriculture	Fish	
<b>EU-25</b>	893	387	90	279	47	1696
<b>Belgium</b>	5	25	3	5	0	38
<b>Czech Republic</b>	18	2	1	3	0	24
<b>Denmark</b>	6	1	0	0	0	7
<b>Germany</b>	115	73	10	17	0	215
<b>Estonia</b>	6	9	3	0	4	22
<b>Greece</b>	20	3	3	1	1	28
<b>Spain</b>	94	28	8	37	5	172
<b>France</b>	6	3	3	48	0	60
<b>Ireland</b>	10	8	0	0	1	19
<b>Italy</b>	247	104	7	55	18	431
<b>Cyprus</b>	10	0	5	1	0	16
<b>Latvia</b>	7	1	0	11	2	21
<b>Lithuania</b>	3	2	1	0	1	7
<b>Luxembourg</b>	1	0	0	0	0	1
<b>Hungary</b>	12	3	10	1	0	26
<b>Malta</b>	6	5	3	0	0	14
<b>Netherlands</b>	52	2	2	32	4	92
<b>Austria</b>	20	9	0	12	0	41
<b>Poland</b>	41	5	24	7	0	77
<b>Portugal</b>	1	3	0	0	0	4
<b>Slovenia</b>	0	1	0	2	1	4
<b>Slovakia</b>	6	1	1	1	0	9
<b>Finland</b>	4	0	0	3	6	13
<b>Sweden</b>	0	1	1	0	0	2
<b>United Kingdom</b>	203	98	5	43	4	353

Note: The table excludes cases withdrawn. Figures for the ten new Member States are included as of 1 May 2004. Source: DG Competition

As regards expenditure under the block exempted measures, new data for 2006 will be published in the autumn 2007 Scoreboard. Data for 2005 were included in the autumn 2006 Scoreboard<sup>72</sup>.

#### 4. PART FOUR: STATE AID CONTROL PROCEDURES

##### 4.1. Registered Aid Cases

The Commission controls the Member States' granting of State aid by means of a formal and transparent procedure. According to the Procedural Regulation, *"any plans to grant new aid shall be notified to the Commission in sufficient time by the Member State concerned"*. In around 8% of registered aid cases, it was not the Member State but the Commission who had to initiate the control procedure after finding out about the existence aid following, for example, a complaint<sup>73</sup>.

In 2006, there were 1009 cases<sup>74</sup> registered by the Commission: 921 cases were notified by Member States, 84 were non-notified cases initiated by the Commission and 4 were cases

<sup>72</sup> COM (2006) 761 final, 11.12.2006

<sup>73</sup> In 2006 there were more than 200 registered complaints, some of which may have led (or may lead) to new registered cases.

<sup>74</sup> This figure excludes measures submitted under the block exemption regulations.

examining existing aid. In addition, information forms for more than 400 measures were submitted under the block exemption regulations. Excluding the information forms, 34% of all registered cases in 2006 concerned the agricultural sector and 53% the industry and service sectors. Of the remaining cases, 9% involved transport and energy and 3% the fisheries sector (see, Table 8).

Of the 921 notifications, just over half were received from five of the largest Member States: Italy accounted for 18% of the total, Germany for 11%, France for 9%, Spain for 9% and the United Kingdom for 6%. In addition, also the Czech Republic had in 2006 a relatively high number of registered notifications (8.5%). Of the 84 non-notified cases, 14 concerned Germany, 13 Italy, 10 the United Kingdom and 8 France.

**Table 8: Number of registered aid cases in 2006**

Sector	Notified aid cases	Non-notified aid cases	Existing aid cases	Total
Agriculture	316	27	1	344
Manufacturing and services	495	41	3	539
Fisheries	28	6		34
Transport and coal	82	10		92
<b>Total</b>	<b>921</b>	<b>84</b>	<b>4</b>	<b>1009</b>

Source: DG Competition, DG Fisheries, DG Agriculture, DG Transport.

#### 4.2. Commission Decisions

In 2006, the Commission took 710 final decisions<sup>75</sup>, a 12 % increase compared with the previous year. In the vast majority of cases, the Commission approved the measures, concluding that the examined aid was compatible (91 % of all decisions in 2006) with the State aid rules or did not constitute State aid (4 % of all decisions). Where the Commission has doubts whether certain aid measures comply with the rules, it carries out a formal investigation during which third parties and all Member States are invited to provide observations. At the end of this investigation procedure, the Commission either takes a positive, conditional or no aid decision (making up 3 % of all decisions) or that it does not comply with State aid rules and hence is not compatible with the Common Market and takes a negative decision (2 % of all decisions).

Table 9 shows the share of incompatible and compatible aid cases on which the Commission reached a decision between 2004 and 2006. Over this three-year period, five Member States accounted for more than 60% of all final decisions: Italy (23% of the total), Germany (13%), France (9%), the United Kingdom (9%) and Spain (8%). Following accession in May 2004, just over 280 final decisions on new aid measures had been taken in the EU-10 Member States by the end of 2006.

Around half (50%) of all final decisions over the period 2004-2006 were in the industry and services sectors, followed by agriculture (41%) transport and coal (6%) and fisheries (3%). It is important to bear in mind that these figures do not distinguish between large and complex

<sup>75</sup> Excluding decisions to open the formal investigation procedure, corrigenda, injunctions, proposals for appropriate measures.

cases involving billions of euro and requiring a lengthy investigation and relatively minor measures for which the aid amount may be less than one million euro.

Of the 79 negative decisions over this three-year period, more than half concerned Italy (22) and Germany (19). They were followed by France (10), the Netherlands (6), Belgium (4), Spain (3), and United Kingdom (3). No other Member State exceeded 2 negative decisions in the last three years.

**Table 9: Number of negative and positive decisions, 2004-2006**

	Total	Approved without objections	Other positive decisions	Negative decisions	
				All negative decisions	of which recovery ordered
<b>EU-25</b>	1941	1698	155	79	42
<b>Belgium</b>	55	37	14	4	
<b>Czech Republic</b>	63	55	8	0	
<b>Denmark</b>	55	45	9	1	1
<b>Germany</b>	258	210	25	19	11
<b>Estonia</b>	12	12	0	0	
<b>Greece</b>	30	26	2	2	2
<b>Spain</b>	157	147	6	3	3
<b>France</b>	168	140	17	10	6
<b>Ireland</b>	42	37	4	1	1
<b>Italy</b>	456	407	26	22	10
<b>Cyprus</b>	9	9	0	0	
<b>Latvia</b>	23	23	0	0	
<b>Lithuania</b>	20	19	1	0	
<b>Luxembourg</b>	6	5	0	1	
<b>Hungary</b>	18	17	1	0	
<b>Malta</b>	3	3	0	0	
<b>Netherlands</b>	120	100	12	6	3
<b>Austria</b>	48	45	2	1	
<b>Poland</b>	79	72	6	1	1
<b>Portugal</b>	23	20	2	1	1
<b>Slovenia</b>	10	8	2	0	
<b>Slovakia</b>	49	47	1	1	1
<b>Finland</b>	25	23	1	1	1
<b>Sweden</b>	44	38	4	2	1
<b>United Kingdom</b>	168	153	12	3	

Note: Some double-counting exists in those cases for which there is both a negative and positive decision. The category 'other positive decisions' is made up of positive and conditional decisions following a formal investigation procedure as well as all 'no aid' decisions. Source: DG Competition, DG Fisheries, DG Agriculture, DG Transport.

Further information on methodological issues may be found on the online Scoreboard:

[http://europa.eu.int/comm/competition/state\\_aid/scoreboard/conceptual\\_remarks.html](http://europa.eu.int/comm/competition/state_aid/scoreboard/conceptual_remarks.html)