

Reference number HT.3639 – Notion of aid

European Association of Mutual Guarantee Societies – AECM

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**AECM contribution to the
public consultation of the European Commission on the
draft Commission notice on the notion of state aid**

Brussels, 14 March 2014

A/Introductory remarks

In the context of the ongoing broad review of EU state aid rules, which the European Commission launched with its Communication on State Aid Modernisation (SAM) of 8 May 2012, the Commission has published on 17 January 2014 a “Draft Commission Notice on the notion of state aid pursuant to Article 107(1) TFEU”, for which stakeholders are invited to provide comments.

Considering that the notion of State aid is an objective and legal concept defined directly by the Treaty, the Commission intends simply to clarify how it understands the Treaty provisions, in line with the EU case-law, without prejudice to the interpretation of the Court of Justice of the European Union. Thus, the notice intends to provide practical guidance in order to identify state aid measures, thereby aiming to cover all constitutive elements of the notion of state aid and to contribute to an easier, more transparent and more consistent application of this notion across Europe.

Given the fact that state aid regulations like the de minimis regulation and the General Block Exemption Regulation are the basis for the promotional activity of the majority of its members, AECM (cf. annex) is pleased to provide the Commission services with its feedback to the proposal. Indeed, most AECM members are either public or private non-profit guarantee institutions providing loan default guarantees for SMEs benefiting from a public counter-guarantee.

B/Main positions

Request for more representative choice of case law – no limitation of the 'market economy investor principle'

Even though the Commission states that it “should be underlined that the primary reference for interpreting the notion of aid is always the case-law of the Union courts” (cf. point 4), thus recognizing the importance of the case-law, the Commission chose the cases referred to in the draft notice in an incomplete way. This can be illustrated by means of the cases referred to for establishing whether a transaction is in line with market conditions (cf. points 100 et sqq.).

The Union Courts have developed the '*market economy investor principle*' to identify the presence of State aid in cases of public investment (in particular, capital injections): to determine whether a public body's investment constitutes State aid, it is necessary to assess whether, in similar circumstances, a private investor of a comparable size operating in normal conditions of a market economy could have been prompted to make the investment in question (cf. point 77).

Making reference to the joined cases T-268/08 and T-281/08 [2012] Land Burgenland and Austria v Commission, the Commission states that the fact that the public entity concerned has prior economic exposure to an undertaking (for instance, if it is an equity holder or if it has provided loans or guarantees) should be taken into consideration when examining whether a transaction is in line with market conditions whereby such prior exposure should not in itself be the result of previous state aid (cf. point 109). In doing so the Commission creates the impression that posterior measures regarding prior exposures constituting state aid are imperatively additional state aid so that the application of the '*market economy investor principle*' is not permitted.

However, it would have been indicated to mention as well the judgement of the General Court (First Chamber) of 2 March 2012 in the joint cases Kingdom of the Netherlands (T-29/10) and ING Groep NV (T-33/10) v European Commission in which it is stipulated that “the Commission misinterpreted the concept of aid by not assessing whether, by accepting the amendment to the repayment terms, the Netherlands State acted as a private investor

would have done in a similar situation” (cf. point 125). This means that posterior changes do not automatically constitute state aid and the '*market economy investor principle*' needs to be applied. The appeal case before the Court of Justice is still pending. But the already delivered opinion of the advocate general confirms this view.

Adaptation of proposal to practical requirements – negative consequences of a limitation of the '*market economy investor principle*' in practice

If the Commission's opinion that posterior measures regarding prior exposures constituting state aid are imperatively additional state aid so that the application of the '*market economy investor principle*' is not permitted were upheld, it would lead to the following negative consequences in practice:

It is very common that during the duration of a loan and/or guarantee agreement constellations arise which require to change the conditions of the agreement. If the beneficiary of a guarantee later on experiences economic difficulties it is generally indicated that the guarantee scheme consents to an adaptation of the terms and conditions of his guarantee agreement in order to minimise and prevent damages.

Such decisions need to be taken under considerable time constraints. If according to the Commission's opinion such posterior changes needed to be notified the enterprises at stake would be forced to file for insolvency. This is due to the fact that the timely delay would result in a factual impediment of the enterprise to meet its financial obligations.

In addition, the number of notifications on the basis of the rescue and restructuring guidelines would increase substantially implying a corresponding increase of the average duration for processing the dossiers.

Moreover, the value of the aid is always determined in the moment of granting the guarantee. Thereby, the worst case scenario of a default is taken into consideration when determining the terms and conditions. In case of a posterior measure to prevent any damages the '*market economy investor principle*' is always applied under the condition that the guarantee amount is not increased. Consequently, later changes of the guarantee agreement do not constitute further state aid.

C/Conclusion

So we would like to strongly recommend that the draft will be revised giving a full picture of the case-law of the Union courts in order to ensure that the application of the notion of state aid will correspond to practical requirements.

Annex/ About AECM

AECM has 39 member organisations operating in 20 EU Member States as well as in Russia, Montenegro and Turkey. Its members are mutual, private sector guarantee schemes as well as public institutions, which are either guarantee funds or Development banks with a guarantee division. They all have in common the mission of providing loan guarantees for SME who have an economically sound project but cannot provide sufficient bankable collateral. In 2012, AECM member organizations had a total guarantee volume in portfolio of over € 79 billion and issued a total of over € 26 billion in new guarantees.

AECM represents the political interest of its member organisations both towards the European Institutions, such as the European Commission, the European Parliament and Council, as well as towards other, multilateral bodies, among which the European Investment Bank (EIB), the European Investment Fund (EIF), the Bank for International Settlement (BIS), the World Bank, etc. It deals primarily with issues related to state aid regulation relevant for guarantee schemes within the internal market, to European support programmes and to prudential supervision.

More information is available on the AECM web-site at: www.aecm.eu