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- COMPETITION -

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1. STEERING BRIEF

This briefing includes seven suggestions in the area of state aid control:

General Block Exemption:

- The German Chambers of Commerce and Industry (DIHK) suggest enlarging the scope of the GBER in particular in terms of the support provided to SMEs and certain large companies. The Commission is currently considering enlarging the scope of the GBER and the focus is for the moment on ports and airports.

Application of State Aid control:

- The German Chambers of Commerce and Industry (DIHK) suggest reviewing the rules on business-related infrastructure and state resources on the basis of the case-law of the Court of Justice. They should adopt a pragmatic approach and refrain from any expansion of the notification obligation.
- The House of Dutch provinces for better regulation suggests:
 - the alignment of definitions (such as innovation) used in State aid and regional policy rules;
 - to make the state aid procedure for the construction of broadband less demanding;
 - reducing barriers in order to create more leeway for ERDF pilot projects and encourage innovation;
 - that greater insight into the State aid rules on land sale and the State aid definition of an enterprise would lead to avoidance of conflict and increase clarity.

The notion of State aid is currently being reviewed by the Commission which plans to issue a Communication in the near future.

De Minimis Regulation:

- The German Chambers of Commerce and Industry (DIHK) suggest increasing the threshold for de minimis Regulation. The de minimis Regulation was adopted in December 2013.

2. GENERAL BLOCK EXEMPTION REGULATION (GBER)

2.1. Submission by the German Chambers of Commerce and Industry (DIHK)

Amendments are necessary, above all, in terms of the *support provided to SMEs*. The limitation on the duration of guarantees for loans to the founders of new businesses should be abolished. In the case of corporate succession it must be possible for family members or employees to take over the company. Particularly among medium-sized companies there are many family businesses where a solution to the problem of

succession has to be found and financing problems might exist.

The assessment of the *incentive effect* has to be simplified. The burden of proof should be reviewed, above all for research/development and investment aid.

Regional State aid for large companies should also be granted for new products, services or innovations. It is positive that the Commission has dropped the originally planned complete exclusion of ad hoc state aid for large corporations. Nevertheless, the requirements must not be so strict and difficult to fulfil that approval becomes the absolute exception. Even if large companies should regularly have fewer problems, their support can provide important stimuli for the SMEs in the regions. This applies not only to greenfield investments, but also new products and services or innovations in the case of operational processes. The field of application should be expanded and more precisely defined. Approval procedures in each individual case would be inappropriate.

The transparency rules must not result in more administrative burden for companies or the publication of business secrets causing disadvantages for companies. The raising of the threshold value for publication is very positive. Nevertheless, business secrets must not be jeopardised, above all in the case of state aid for research, development and innovation.

The risk of miscontrol has been significantly reduced as a result of the last changes. In respect of the “loss of capital”, the absence of a time reference is however problematic.

Overall, in the last revision a few substantial improvements were carried out, in particular the block exemption for the regional infrastructure and advisory services. Also the other groups and the increase in the threshold values for re-search, development and innovation are indeed very positive with respect to the reduction in the administrative effort. In the details, however, further improvements are required (cf. above).

2.2. Policy Context

The GBER simplifies aid granting procedures by authorising Member States to grant aid without prior notification to the Commission (under Article 108 (3) of the TFEU) through a range of aid measures fulfilling horizontal common interest objectives. While the notification allows the Commission to check the compatibility of the aid with the internal market, the categories of aid exempted from notification under the GBER are presumed to be compatible with the TFEU.

The GBER was revised in 2014 in the framework of the broad review of State aid rules launched by the Communication on State Aid Modernisation (SAM) of 8 May 2012 according to which State aid enforcement should facilitate sustainable, smart and inclusive growth, focus on cases with the biggest impact on the single market, streamline the rules and provide for faster, better informed and more robust decisions. The review of the GBER was at the centre of the SAM reform and contributes to all objectives, with a particular focus on simplification.

By setting both a *maximum amount and a maximum duration concerning aid in the form of loans to start-ups* (Art. 22), the Commission aimed to strike the right balance between simplification and proper calculation of the aid amount (i.e. ensuring the default interest rate used to estimate the aid element remains defensible compared to market rates). For periods above ten years, it is difficult to reliably estimate a market interest rate and

therefore to calculate the amount of aid involved for the purpose of ensuring that the GBER principles are respected.

As regards corporate succession, the change of ownership through family members and employees has been treated as not per se creating new value (investment). Therefore, the revised GBER has not changed the principle according to which these categories of new owners may not benefit from state aid for the purchase of shares.

The *assessment of incentive effect* was simplified compared to the previous GBER. Both for SMEs and large undertakings under schemes, the only current requirement is that an application for aid is made before the start of works. Additional documentation is only required for ad hoc aid to large companies, as this type of aid is less likely to be part of a well-designed aid policy and it is more difficult to establish its incentive effect.

Regional aid may be granted in 'c' regions (more developed assisted areas) for an initial investment to SMEs, whereas aid to large enterprises may only be granted for initial investments in favour of new economic activities. A more restrictive approach on aid to large enterprises in the 'c' areas has been chosen in the light of doubts about the effectiveness of regional aid to large enterprises in these regions, especially with respect to "follow-on investments" (as opposed to "greenfield") investments. Large enterprises are less affected by regional handicaps and there are other aspects than aid, such as economies of scale that are considered to be more decisive by companies when choosing a location to invest.

For this reason initial investments in new economic activities are allowed under the GBER, but "follow-on investments", such as diversification of existing establishments into new products or new process innovations is subject to the notification obligation pursuant to Article 108(3) TFEU. Therefore, aid for the latter type of investment needs to be assessed by the Commission on a case-by-case basis and might be found compatible with the internal market on the basis of the Guidelines on regional state aid for 2014-2020.

Transparency rules ensure that public authorities and private actors have easy access to all pertinent information about aid awarded under the GBER. This shall provide for better accountability of public spending in times of scarce resources and facilitate control and enforcement by national authorities (e.g. checks of cumulation, treatment of complaints). In the medium term, transparency will also reduce the need for extensive ex post monitoring and simplify (and possibly remove) most reporting obligations. In order to balance the benefits of transparency with the risk of creating additional administrative burdens, the Commission has only subjected to this requirement aid amounts above a certain threshold (EUR 500 000), which based on Commission estimates only concerns 15% of cases. The protection of business secrets is guaranteed by the Commission communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions.

The amended GBER has substantially enlarged block exempted areas by adding new aid categories and by extending the existing ones (horizontal enlargement), as well as by increasing notification thresholds for aid intensities in key areas linked to the Europe 2020 objectives (such as Research, Development and Innovation activities (RDI) and risk finance). This extension, as well as the extension of de minimis aid to enterprises in difficulty excludes more schemes from the notification obligation and reduces administrative burden at the level of Member States and companies (particularly SMEs).

Current Situation

The Commission is exploring if further aid categories can be added to the GBER in the future, in particular as regards ports and airports.

3. COMMUNICATION ON THE NOTION OF STATE AID

3.1. Submission by the German Chambers of Commerce and Industry (DIHK)

The rules on business-related infrastructure and state resources have to be reviewed on the basis of the case-law of the Court of Justice. They have to adopt a pragmatic approach and refrain from any expansion of the notification obligation.

3.2. Policy Context

According to Article 107 (1) of the Treaty on the Functioning of the European Union (TFEU), "[s]ave as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

The European Commission is in charge of assessing the compatibility of the aid with the common market, in the light of Article 107(1) TFEU.

Measures that qualify as State aid under article 107 (1) TFEU are therefore to be notified to the European Commission (according to Article 108(3) of the TFEU) which is in charge of assessing its compatibility with the common market.

The Commission is working on a Communication on the notion of State aid, explaining the concept of State aid as defined in Article 107(1) TFEU. The objective of the Communication is to provide greater clarity on the notion of State aid pursuant to Article 107(1) TFEU, particularly as regards infrastructure financing. This should provide legal certainty in relation to investment projects and is in line with the Commission's investment plan and the overarching objective of enhancing investment in support of jobs, growth and competitiveness.

A number of respondents called upon the Commission to clarify further the applicability of State aid rules to the financing of (business-related) infrastructure in a public consultation organised in 2014 on a draft of the Communication.

4. CONFLICTING DEFINITIONS IN DIFFERENT POLICY AREAS (STATE AID / REGIONAL POLICY)

4.1. Submission by the House of Dutch Provinces for better regulation

Legislation:

Non-allignment of definitions used in legal acts of different policy fields, notably State aid rules and regional policy (definition of innovation).

Problem description/burden on citizens and business:

The definition of 'Innovation' used by DG Competition is different from the definition used by DG Regional policy. The Dutch provinces 'commute' between these two Directorates General whenever wishing to spend funds from the ERDF. The programme they draw up for that spending must be approved by DG Regional and Urban Policy, but whenever a province wishes to award government aid, DG Competition is required to give permission. It has happened that the permission came so late that the money could no longer be spent; the deadline from DG Regional and Urban Policy had expired.

The phenomenon of 'visiting Brussels twice' recurs in several areas. Provinces participating in a grant application or supervising parties in drawing up a grant application may for example request a grant from DG Environment or DG Regional and Urban Policy, at which point they then have to report the application for government aid to DG Competition. If the issue involves farming, they may even have to 'travel to Brussels' on three occasions, because they then also have to report to DG Agriculture.

Simplification measure/suggestion:

The European Commission is attempting to make the rules clearer, above all for industry, but often works on a directive by directive basis. The problems however, are in the interaction between different directives.

Make it Work is an example of a purely practical, integrated approach. On the initiative of the Netherlands (the Ministry of Infrastructure and the Environment), about ten countries are working to improve the rules, rather than constantly coming up with new rules. The countries then call upon the Commission, whenever changes are made to existing regulations, to simultaneously eradicate the incompatibilities with other directives. For example, if the Bird and Habitat Directives are altered, the contradictory rules in other directives (for example the Framework Directive on Water) must at the same time be taken into account.

The Juncker Investment Plan for Europe is another example of how things can work: in the plan, approval for government aid is included in the same procedure as the grant application. In this plan, the Commission has undertaken to apply a simplified government assessment in the case of requests from Member States for a loan from this fund on condition the project meets a number of requirements.

4.2. Policy Context

Policy context

State aid control is essential to protect the integrity of the internal market. A strict control of State aid is critical for the achievement of economic and social cohesion. In the absence of State aid control, there would be a serious risk that regions and Member States would engage in subsidy races to attract mobile investments or support local companies.

This would be to the detriment of Member States that do not have the budgetary capacity to match the resources available to Member States with larger budgetary capacities. It is therefore in everyone's interest that the Commission takes a strict approach to the granting of State aid by Member States.

At the same time, it is acknowledged that regional disparities in economic development and well-being are very wide in the EU and that the granting of State aid to promote regional development in disadvantaged regions can therefore be justified. European Structural and Investment Funds (European Structural and Investment funds (ESI) are therefore, along national or regional/local budgets, co-financing many measures to support economic activities. Given that it's the Member States who are responsible for allocating the EU funds (including European Structural and Investment funds (ESI) and that the aim of State aid control is to avoid disparities between Member States, these projects are also subject to State aid control. This implies that, besides the rules set out in the European Structural and Investment funds (ESI) -related legislation, these projects also need to comply with State aid rules.

State aid policy is an important component of the EU Cohesion policy under which the Member States are responsible for allocating EU funds. These co-financed projects are subject to State aid control. In the 2007-2013 programming period, around 40% of structural funds involved State aid. The 2014-2020 period marks a clear shift of cohesion policy towards smart growth investments resulting in a higher number of projects where State aid is potentially involved.

Legal framework and current practice

ESI Funds are managed and allocated by Member States, who can decide how to allocate funds. Given this discretion and in order to avoid disparities among Member States, projects also fall under State aid control and need thus to be notified to the European Commission.

Article 107(3)(a) of the Treaty on the Functioning of the European Union (TFEU) allows Member States to grant State aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment.

Article 107(3)(c) TFEU allows regional State aid to facilitate the development of certain economic activities or of certain economic areas where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

The basic principles underlying the State Aid framework can be summarised as follows:

- To be effective, aid must be focussed on the regions that need it most. Regional aid maps are used to show the areas in which companies may receive regional State aid, and at what intensity.
- Aid should promote activities that provide a basis for long-term regional growth. This puts the focus on aid for initial investment, and only in exceptional circumstances allows for the granting of operating aid.

The rules are set out in:

- Regional aid guidelines for 2014-2020 (adopted in June 2013), which set the basic framework for the granting of regional aid between 01/07/2014 and 31/12/2020. They contain:
 - Criteria for designation of areas eligible for regional aid between 2014 and

2020. As of 16/09/2014, all regional aid maps have been adopted.

- Conditions under which regional aid can be granted (eligible types of projects, maximum levels of aid and other conditions to be respected).
- The General Block Exemption Regulation (GBER), which defines the criteria necessary to gain exemption from advance Commission approval for regional aid. The new GBER entered into force on 1 July 2014.

Between 2007 and 2012 almost 40% (EUR 30 billion) of all regional aid was spent under the general block exemption regulation. The use of the block exemption has increased over the period, with almost 47% of all regional aid in 2012 being granted under this instrument. Some Member States chose to provide regional aid only under block exempted measures (e.g. UK).

While the new regional aid guidelines establish rules to assess the bigger cases of regional aid, the new general block exemption regulation has been extended. Both the categories of measures and the aid amounts have increased. This allows the Commission to focus on cases involving large amounts of aid with a significant potential impact on the internal market.

The list of aid types which the Member States may grant without a notification obligation has been extended, e.g. ad hoc aid below the notification threshold, operating aid schemes for outermost regions, transport aid schemes for outermost regions and sparsely populated areas.

Background information

In the past the implication was that all co-financed ESI Funds measures constituting State aid had to be notified to and approved by the Commission before they could be implemented. In some cases this resulted in delays in the implementation of ESI Funds programmes. To remedy this problem, the Commission already started in the beginning of the previous decade exempting unproblematic State aid measures from the ex-ante notification requirement under the so-called block exemption regulations (these regulations set out clear conditions for different types of aid; provided an aid scheme was in line with those conditions, it could be implemented by the Member State concerned without the need to notify and await approval by the Commission). Over the years, the Commission has extended the scope of these block exemption regulations. As a result, the vast majority of measures co-financed by ESI Funds can be implemented directly by the Member States without the need to notify.

One of the cornerstones of the State aid modernisation exercise started by the Commission in May 2012 is the establishment of a new General Block Exemption Regulation (GBER) which entered into force on 1 July 2014 and which simplifies aid granting procedures for Member States even further. The GBER has been extended both in scope, by covering new categories and forms of aid, and in the amount of aid that can be granted, with higher notification thresholds and larger aid intensities. Increasing the use of the GBER will have a strong impact on aid beneficiaries and on granting authorities, leading to faster access to the aid (through avoidance of the notification process) and reduction of administrative burdens (thanks to simpler conditions, e.g. for demonstrating the incentive effect). The Commission is currently working on the possibility of further extending the scope of the GBER by including aid for airports and ports.

5. STATE AID BROADBAND RULES

5.1. Submission by the House of Dutch Provinces for better regulation

Legislation:

State aid rules relating to broadband

Problem description/burden on citizens and business:

In the same way as several regions in other Member States, a number of Dutch provinces wish to encourage the construction of a broadband infrastructure in rural areas. Industrial operators are not willing to carry out this process, because it is commercially unattractive. The low population density means investments are high for them, with few clients in return. The European Union is promoting the construction of (superfast) broadband, and has introduced a series of schemes to which provinces can apply for (additional) subsidy. There is for example a scheme within the European Structural and Investment Funds: *Connecting Europe* Facility. The European Fund for Strategic Investments (EFSI) also has a potential role. Nonetheless, it is often not possible to bring the subsidies and established plans together. A province submits a subsidy application for the construction of new generation access (NGA) or superfast broadband. In principle, the investment costs for these networks are eligible for the subsidy.

Since 1 July 2014, these projects have no longer been required to pass through the long and demanding notification procedure for state aid; it is enough for the province to simply issue an exemption notification. Nonetheless, even this procedure is not an easy one; the subsidy can only be issued for construction in areas that as yet have both no infrastructure and where no infrastructure is set to be introduced in the next three years. Via a public consultation procedure, the province is required to determine whether these areas are set to remain 'blank spots' on the map. Such procedures are often very difficult, because for reasons of competition, businesses are unwilling to reveal their plans for the next few years.

According to the rules on state aid, the subsidy must be awarded on the basis of a 'public, transparent and non-discriminatory competitive selection procedure'. It is unclear for provinces when the procedure is sufficiently 'open and transparent' for the state aid rules; they have the feeling that too much emphasis is placed on possible falsification of competition in the awarding of subsidies, when the request in fact relates to a subsidy tender to which any number of parties can respond.

Simplification measure/suggestion:

It is not sufficient to make the state aid procedure for the construction of broadband less demanding. The conditions for obtaining an exemption from the notification procedure are very strict, and not in line with the 'lighter' procedure. A more effective method would be to introduce the lighter test as applicable for the Investment Plan for Europe (EFSI).

In a previous instance of broadband construction by provinces, the European Commission issued a so-called comfort letter, making it clear to all parties that a less stringent procedure would be sufficient.

Finally, it would be extremely useful for the provinces to be able to estimate in advance the costs they are expected to incur, in order to comply with the rules on state aid and public procurement procedures. By way of illustration: for one broadband project a

province was forced to employ one FTE for a whole year, in order to fulfil the requirements of the procedures. In drawing up the new rules, the European Commission should prepare an estimate of the costs for subnational authorities via an *impact assessment*.

5.2. Policy Context

State aid control is essential for protecting the integrity of the internal market. A strict control of State aid is also critical for the achievement of economic and social cohesion. In the absence of State aid control, there would be a serious risk that regions and Member States would engage in subsidy races to attract mobile investments or support local companies. This would be to the detriment of the weaker Member States that do not have the budgetary capacity to match the resources available to more prosperous Member States. It is therefore in everyone's interest that the Commission takes a strict approach to the granting of State aid by Member States.

At the same time, it is acknowledged that certain activities and regions attract lower investments as profit prospects are not immediate, although these activities are crucial for economic development of the relevant areas. Broadband connectivity is of strategic importance for all sectors of the economy as well as for social and for territorial cohesion. The European Union's Europe 2020 Strategy ("EU2020") along with one of its flagship initiatives, the Digital Agenda for Europe ("DAE") state the objective of bringing basic broadband to all Europeans by 2013 and ensuring that, by 2020, (i) all Europeans have access to much higher Internet speeds of above 30 Mbps and (ii) 50 % or more of European households subscribe to Internet connections above 100 Mbps.

To roll out the necessary broadband infrastructure, public funding is necessary to complement private investments in order to ensure coverage of areas insufficiently served by the market (in particular in order to bridge the 'rural divide') and to improve existing networks and thus ensure better coverage, speeds, and the necessary support for new and innovative services (delivering a 'step change' as compared to current infrastructure).

Member States have different needs of broadband network technologies (due to differences in existing networks, geographical topologies) and different funding abilities (availability of funds, different levels of revenue). Therefore, when public funding is involved, it is crucial to have a level playing field for the protection of private investors, alternative operators and different technologies.

The Commission has continuously supported public financing aimed at supporting adequate broadband coverage at affordable prices for all European citizens, not least in rural areas. To this end State aid rules ensure that, where broadband infrastructure has been publicly funded, technological neutrality and open access to alternative operators are protected and crowding out of private investments by overbuilding infrastructure is avoided.

The procedures linked to the granting of state aid for broadband activities have already been simplified recently: first in 2013 by the EU Guidelines for the application of state aid rules in relation to the rapid deployment of broadband networks and again in 2014 with the adoption of the General Block Exemption Regulation (GBER). The Broadband Guidelines which were revised in 2013 take into account these objectives and aim to support Member States in achieving the Digital Agenda targets. The new General Block

Exemption Regulation adopted in 2014 is a further means of promoting certain types of investment aid for broadband projects without requiring notification.

While there was no impact assessment before the elaboration of the GBER, the Broadband Guidelines were subject to an impact assessment. The general principles of State aid rules in this field have therefore been tested for impact. The GBER provisions are further simplifications of these principles.

6. STATE AID RULES AND ERDF INNOVATION PROJECTS

6.1. Submission by the House of Dutch Provinces for better regulation

Legislation:

State aid rules and public procurement rules create bottleneck for ERDF subsidy submissions.

Problem description/burden on citizens and business:

State aid rules regularly reveal a somewhat outdated vision on cooperation between (subnational) authorities and businesses, often backed by knowledge institutions such as universities. Research and innovation projects for example are characterised by a certain degree of unpredictability. It is possible that the focus will shift during the course of the project.

A precondition for the granting of aid by the European Commission is that the procurement rules must be complied with. However, a tendering procedure sometimes takes so long that the period within which the money must be spent (mostly one year) has already expired. For public-private and public partnerships, subnational authorities may face a variety of different tendering issues. How can a province wishing to implement a project with a selected partner do so without having to undergo the compulsory tendering procedure? And how can the 'public partners' in a partnership award orders to other partners in the partnership?

A project of this kind may well have been started precisely to create the necessary freedom, and to investigate the boundaries, but state aid and public procurement rules are no longer suitable. One example is the relatively new concept of *living labs*:

Businesses and knowledge institutions, including universities, are increasingly joining forces to establish pilot projects or living labs, where the product or service they wish to develop together is tried out in a situation that approximates reality as closely as possible. The initiators also involve the end users, consumers or other businesses and institutions in the pilot. The feedback from all stakeholders sometimes leads to important adjustments to the product or service. The advantages of a pilot project or living lab are that the users end up with products or services that tie in better with their needs and capabilities, businesses manufacture products that are better matched to demand, and the knowledge institutions can test their ideas in practice. This approach to working encourages and indeed accelerates innovative developments. The European Commission recognises these advantages, and has included the phenomenon of the living lab in European funds. As a consequence, in principle they are eligible for subsidies, for example from the European Regional Development Fund (ERDF). However, there are other European rules that hinder the process, as demonstrated by the following example:

A university wishes to launch a pilot project for entrepreneurs from the small and medium enterprise sector (SME). Within the pilot project, a product will be tested and demonstrated. It has reached the final stage before being brought to market. The SMEs will be able to make free use of the facilities of the university. The university submits an application for an ERDF subsidy, which comes up against a series of bottlenecks:

- Because the university intends to ‘pass on’ part of the subsidy to the participating SMEs, this is effectively a two-level subsidy. If the rules are strictly interpreted, this means that the subsidy has to be registered for a procedure that can take between three and eighteen months; a very long lead time for a project of this kind;
- The amount of the subsidy can be restricted by the rules on state aid. Because the product is nearly ready for the market, the idea is that the subsidy could result in unfair competition;
- Because the parties are already working together as unique partners in this pilot project, it is in many cases not possible for a public procurement procedure to have taken place for the selection of the cooperation partner. Because in the elaboration of the cooperation there could be indications of government orders subject to a compulsory procurement procedure, the subsidy application may end up being rejected on the basis of tendering objections.

Simplification measure/suggestion:

To create more leeway for pilot projects, and as a result to encourage innovation, these barriers need to be reduced and if possible eradicated. It would be a sound move, for example, to introduce a new exemption for pilot projects, thereby broadening the possibilities within the rules for state aid. If the possible ‘passing on’ of the subsidy to the SMEs then complied with the rules, it should be sufficient to issue notice, rather than requiring the long-term registration procedure. A simplified test for state aid that is carried out more rapidly could also work in favour of pilot projects. Within the European Fund for Strategic Investments (EFSI), this less strict test is already applied.

The cooperation between government and public-private parties must have priority. With that in mind, just like research institutions, nature conservancy organisations should be permitted to carry out 15 to 20 percent of their activities on a commercial basis. If they remain below that limit, they will not be viewed as commercial players. Cooperation between government, industry and other institutions, and cooperation between individual government authorities should not be weighed down with unnecessary administrative burdens.

6.2. Policy Context

Policy context

Public procurement rules aim at creating a level playing field for all businesses across Europe, EU law sets out minimum harmonized public procurement rules for tenders whose monetary value exceeds a certain amount. For tenders of lower value, national rules apply. Nevertheless, these national rules also have to respect the general principles of EU law in order to avoid disparities between companies.

At the same time, State aid control is essential for protecting the integrity of the internal market and for economic and social cohesion. In the absence of State aid control, there

would be a serious risk that regions and Member States would engage in subsidy races to attract mobile investments or support local companies. This would be to the detriment of Member States that do not have the budgetary capacity to match the resources available to Member States with more budgetary capacities. It is therefore in everyone's interest that the Commission takes a strict approach to the granting of State aid by Member States.

On the other hand, it is acknowledged that regional disparities in economic development and well-being are very wide in the EU and that the granting of State aid to promote regional development in disadvantaged regions can therefore be justified. Therefore, the EU Cohesion funds co-finance projects together with Member States. This is done for instance through the European Regional Development Fund (ERDF).

Therefore, given that it is the Member States who are responsible for allocating the EU funds (including ERDF), both public procurement and state aid rules need to be respected in the allocation of these funds in order to avoid distortions at company level for the first one and among Member States for the second.

Legal framework and current practice

The ERDF is managed and allocated by Member States, who can decide how to allocate funds. In order to avoid disparities among Member States, this distribution of funds is subject to State aid control and need thus to be notified to the European Commission.

The Treaty on the Functioning of the European Union (TFEU) allows state aid to be granted for the economic development of areas where the standard of living is abnormally low or where there is serious underemployment (article 107(3)(a)) as well as for the development of certain economic activities or of certain economic areas (article 107(3)(c) TFEU). The basic principles underlying the State Aid framework can be summarised as follows:

- to be effective, aid must be focussed on the regions that need it most. Regional aid maps are used to show the areas in which companies may receive regional State aid, and at what intensity.
- aid should promote activities that provide a basis for long-term regional growth. This puts the focus on aid for initial investment, and only in exceptional circumstances allows for the granting of operating aid;
- in order to avoid distortions among companies, public procurement rules must be complied with. The latter are set at national level, except for projects of higher economic value for which distortions are more disruptive for the internal market, which explains that rules are minimally harmonised at EU level.

The State aid rules on regional aid are set out in:

- Regional aid guidelines for 2014-2020 (adopted in June 2013), which set the basic framework for the granting of regional aid between 01/07/2014 and 31/12/2020. They contain:
 - Criteria for designation of areas eligible for regional aid between 2014 and 2020. As of 16/09/2014, all regional aid maps have been adopted.
 - Conditions under which regional aid can be granted (eligible types of

projects, maximum levels of aid and other conditions to be respected).

- The General Block Exemption Regulation (GBER), which defines the criteria necessary to gain exemption from advance Commission approval for regional aid. The new GBER entered into force on 1 July 2014.

While the new regional aid guidelines establish rules to assess the bigger cases of regional aid, the new general block exemption regulation has been extended. Both the categories of measures and the aid amounts have increased. This allows the Commission to focus on cases involving large amounts of aid with a significant potential impact on the internal market.

The points raised seem to concern more specifically the rules on public support for research and development. In the recent State Aid Modernization, the Commission has reviewed all the rules in the field of Research & Development & Innovation in the form of new and expanded provisions in the GBER and the new Framework for State Aid for Research, Development and Innovation 2014 ("the R&D&I-Framework").

Several aspects should be highlighted in the context of this submission by the Dutch provinces:

- Firstly, the new R&D&I rules ensure greater flexibility, for instance by increasing the allowed aid intensities and the amounts at which aid needs to be notified in advance to the Commission, so that more measures can be implemented directly under the GBER **without prior clearance** by the Commission.
- Secondly, the new GBER, in order to support the transition from development to production in the fast-moving technology markets, also explicitly covers **laboratory-scale prototypes and small scale pilot lines**. These are considered as industrial research, which allows a higher aid intensity than for experimental development. Hence, this would seem to already cover some of the proposals made in the question.
- Thirdly, the new R&D&I-Framework (in its section 2.3), with regard to **public procurement of R&D services**, makes a distinction between 'exclusive development' (i.e. where the public purchaser reserves all results and benefits exclusively for itself), to which the Public-Procurement Directives apply, and 'pre-commercial' procurement, to which they do not apply. The procurement qualifies as 'pre-commercial' if the public purchaser does not reserve all results and benefits exclusively for itself and excludes purchase of commercial volumes of final product/service. In this case, it is considered that there is no state aid if the procurement takes place via an open, transparent non-discriminatory procedure and on certain conditions which ensure dissemination or wide access to the results.
- Finally, point 20 of the new R&D&I Framework contains the **concept of 'ancillary economic activities'** (which are not subject to State-aid rules if directly related to and necessary for the operation of the research organisation **or** intrinsically linked to its main non-economic use). They must be limited in scope - consuming exactly the same inputs as non-economic activities and allocated capacity is less 20 % of relevant entity's overall annual capacity. On these conditions, this activity is considered as "ancillary" to the main non-economic

activity and thus outside State aid rules.

7. STATE AID RULES ON LAND SALE / DEFINITION OF ENTERPRISE

7.1. Submission by the House of Dutch Provinces for better regulation

Legislation:

State aid rules on land sale and State aid definition of an enterprise.

Problem description/burden on citizens and business:

There are numerous regional industrial estates throughout the Netherlands that are out of date and sometimes in poor condition. To encourage the regional economy and employment opportunities, provinces sometimes have industrial estates thoroughly redeveloped. For this purpose, the province joins forces with a project developer. In this form of area development, the province has to deal with a variety of EU rules. If the province wishes to compensate for the effects on the environment of the increased economic activities, something that happens quite regularly, yet another set of rules then applies.

As shown in the following case study, the entire situation becomes highly complex:

The province wishes to redevelop and expand an industrial estate to once again make it attractive for businesses from the region as an establishment location. A project developer is interested in purchasing the land. The agreed price is below the market value, but in exchange, the project developer has agreed to prepare the land for construction and ensure access. When selling the land, the province has to deal with the European public procurement, state aid and competition rules. The state aid rules concerning land sale will be tightened up: aspects from the procurement rules will be included in the land sale rules, according to which the procedure now has to be open and transparent. The provinces are uncertain as to when the procedure is sufficiently open and transparent.

As a result of renewed activities, nitrogen emissions rise. EU regulations oblige government to protect biodiversity and so-called Natura 2000 areas, and offer a series of possible subsidies in that connection. To comply with the rules, and to compensate for the emission of nitrogen into the adjacent nature area, the province instructs a nature conservation organisation to raise the water level, and to clean the nearby peat land. For this purpose, the province intends to issue a subsidy to the organisation. The province applies for a European subsidy for the measures in the nature area. However, in line with recent judgements by the Commission and in accordance with case law, the nature conservation organisation now has to be viewed as a business, and here too the rules on state aid apply.

Simplification measure/suggestion:

A greater insight is required into the consequences of certain forms of regulations, for subnational authorities. In the event of the sale of land, three types of rules apply, and even those rules seem to be in conflict with one another in terms of implementation; this again results in uncertainty and lack of clarity. An impact assessment could provide the necessary insight. Nonetheless, it is important that the assessment of the consequences be carried out after the rules in question have been amended by the European Parliament and the Council. After all, these institutions often tend to introduce other far-reaching changes. The rules on state aid should not be applicable to nature conservation

organisations, at least as long as their activities are not economic and are exclusively aimed at providing support. In certain sectors, such as research, education and innovation, an exemption of this kind already applies, and could be extended.

7.2. Policy Context

Policy context

The three types of rules referred to by the Dutch provinces serve different purposes.

Public procurement rules aim at creating a level playing field for all businesses across Europe. For tenders whose monetary value exceeds a certain amount and which are therefore distortive of competition there are harmonized minimum requirements at EU level while other projects are subject to national legislation but have to respect the general principles of EU law in order to avoid disparities between companies.

At the same time, State aid control is essential for protecting the integrity of the internal market as well as economic and social cohesion. In the absence of State aid control, there would be a serious risk that regions and Member States would engage in subsidy races to attract mobile investments or support local companies. This would be to the detriment of the weaker Member States that do not have the budgetary capacity to match the resources available to more prosperous Member States. In the case of sale of land at prices below market value to stimulate investments, Member States are in charge of selecting the buyers who through this transaction become beneficiaries of State aid. State aid control is therefore necessary to ensure a level playing field both between Member States and among companies. It is therefore in everyone's interest that the Commission takes a strict approach to the granting of State aid by Member States. However, the aid granting procedure has been largely simplified by the adoption of the new General Block Exemption Regulation (GBER) in 2014.

Finally, environmental subsidies are a way of ensuring a proper burden distribution among polluters depending on their relative footprint, in a manner limited to what is needed for the environmental effort only. State aid for environmental protection objectives can be granted only if it leads to an increased contribution to the Union environmental objectives without adversely affecting trading conditions to an extent contrary to the common interest, and the polluter pays principle has to be always respected i.e. the costs of measures to deal with pollution should be borne by the polluter who causes the pollution.

Where subsidies by Member States are paid out to undertakings, State aid control applies, also to nature conservation organisations which also have an economic activity. Not applying it to economic activities carried out by nature conservation organisations could lead to discrimination between undertakings carrying out the same economic activity, one being subject to State aid control the other not.

Therefore, all three sets of rules need to be respected when applicable¹, alone or cumulatively. However, when subsidies are granted for the acquisition of nature land,

¹ Commission Decision of 02.07.2009 in SA 22741 – Germany, Transfer of natural protection areas to new owners and measures for bio diversity, OJ C 230 of 24.09.2009; Commission Decision of 20.04.2011 in case SA.31494 – Subsidies for nature management, OJ C 12 of 14.01.2012; Commission Decision of 13.07.2011 in case SA.31243 – Subsidieregeling grondaankoop EHS, OJ C 303 of 14.10.2011.

public procurement rules do not apply, as article 10 (a) of Directive 2014/24/EU clarifies that "the directive does not apply to public service contracts for: the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon"².

Legal framework and current practice

The notion of State is defined in Article 107(1) TFEU. It is an objective notion which the Commission has no power to redefine. What the Commission can do, however, is to assess when aid is compatible with the Internal Market, and also provide practical guidance on how to apply the case law and the Commission's decisional practice in concrete cases.

State aid rules apply only to undertakings, i.e. to legal and natural persons which offer goods or services on the market. Non-economic activities fall outside the scope of EU competition rules. In this respect, the Court of Justice has clarified that the core activity of nature conservation organizations is non-economic, but that it may be that such organizations also, in parallel with their non-economic functions, perform secondary activities which are economic in nature³. To the extent that they do so, they are in competition with other undertakings and state aid rules will therefore apply to that part of the organization's activities (but not to the nature conservation proper). It is therefore not entirely correct that nature conservation organisations have to be viewed as businesses.

Assuming that the buyer is indeed an undertaking competing on the markets, it is settled case law that the sale by public authorities of land or buildings to an undertaking constitutes State aid if the sale is not taking place at market value (i.e. at the price which a private investor, operating in normal competitive conditions, would be likely to have accepted). Indeed, the undertaking could otherwise receive an asset at reduced price which it could use to undercut its competitors. By contrast, if land is sold to an entity *not* engaged in any economic activity (e.g. a nature conservation organization with no side activities), the State aid rules do not apply.

It may indeed not be obvious in all cases how the market value of land should best be assessed. This is why the Commission, in the [communication concerning aid elements in land sales by public authorities](#), has provided a set of practical guidelines to help the authorities of the Member to ensure that the sale of public land and buildings to undertakings is free of State aid by verifying that the price of sale reflects the market value. The Communication is expected to be replaced by the Communication on the Notion of Aid⁴, soon to be adopted, which will also apply to sales of land by public authorities. However, this is purely a matter of consolidating the presentation of the Commission's guidance, and no substantive changes to the guidance principles are intended. It is therefore not correct that the "aid rules concerning land sales will be tightened up".

² Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance, OJ L 94, 28.3.2014, p. 65–242.

³ Commission Decision of 2 September 2015 in case SA.27301- ; Judgment of 12 September 2013, Germany vs Commission (T-347/09), ECLI:EU:T:2013:418, OJ C313, of 26.10.2013.

⁴ http://ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf

As specifically regards the revitalisation of industrial sites, the Commission has also provided further practical guidance to the national authorities by clarifying that public financing of the development and revitalization of public land can fall outside the State aid rules. In its decision of 27 March 2014 (SA.36346), the Commission found that making a terrain ready for building and ensuring that it is connected to utilities (water, gas, sewage and electricity) and transport networks (rail and roads) is not an economic activity, but part of the public tasks of the State, namely the provision and supervision of land in line with local urban and spatial development plans (provided certain conditions are met).

Finally, even if the contribution of the authorities in a revitalization project should involve State aid, Article 56 of the GBER on aid to local infrastructure offers possibilities to provide this assistance without the need of prior notification to the Commission.

As further regards incentives and subsidies for the purpose of nature improvement, carbon emission reduction and environmental measures, public support can be given for several different purposes. The Commission has adopted Guidelines on environmental aid⁵ that set out the conditions on which subsidies to promote environmental protection⁶ can be granted. This includes for instance aid for renewable energy, energy savings, investments that increase the level of protection beyond Union standards or the remediation of contaminated sites. The GBER also includes possibilities to grant such subsidies without prior notification to the Commission.

To further simplify matters, the compatibility of investment subsidies for the remediation of contaminated sites was, under the State Aid Modernization plan, moved from the Guidelines for environmental aid, and aid for such projects can now be granted under the GBER provisions (i.e without prior notification to the Commission. The GBER allows for aid intensities up to 100% of the costs.

Measures to promote biodiversity are not covered by the Guidelines on environmental aid but can be authorised on the basis of the rules that apply to Services of General Economic Interest (SGEI) rules⁷. Provided that the conditions in the SGEI Decision⁸ are complied with, this aid could be implemented without prior notification to the Commission.

To conclude, if State aid is granted, the GBER and the SGEI Decision allow for a wide range of aid measures to promote environmental objectives which can be implemented directly without prior authorization by the Commission.

It is current Commission policies to carry out an impact assessment of its proposals which are likely to have significant economic, environmental or social impact. An inter-institutional agreement on Better Law-making between the Parliament, Council and the Commission is currently waiting now for ratification by the Parliament. According to the agreement, the European Parliament and the Council are called upon carry out impact

⁵ Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1–55.

⁶ Environmental protection is defined as any action designed to remedy or prevent damage to physical surroundings or natural resources by a beneficiary's own activities, to reduce the risk of such damage or to lead to more efficient use of natural resources.

⁷ See cases SA.31243 and NN8/2009.

⁸ Decision 2012/21/EU (OJ L 7, 11.1.2012, p. 3).

assessment on any substantial amendments that they propose during the legislative process.

However, as explained above, the State aid guidelines on the sale of land are only Commission guidance to Member States and stakeholders on practical means to establish the market value of sold property. Whether or not a specific transaction constitutes State aid depends on the notion of aid as laid down in the Treaty and cannot be changed by the Commission.

8. DE MINIMIS REGULATION

8.1. Submission by the German Chambers of Commerce and Industry (DIHK)

The inclusion of de minimis State aid for affiliated companies in the calculation of the total amount of aid is not justified. The "safe harbour" provisions for certain loans and guarantees need to be adapted to the standard financial periods, above all with respect to their maturities.

The approach applied by the European Court of Justice in the case (OJ C 155/10 of 20 June 2008) was justified by the particular circumstances of the specific case. In the standard case there is no connection between legally affiliated companies with respect to the specifically supported activities, so that combining de minimis state aid is not appropriate and also not supported by the European Court of Justice. Such an approach would significantly restrict the impact of de minimis state aid without any objective justification.

The guarantee notice and the possibility of the application of computational methods are important tools to facilitate the application of the de minimis Regulation. More flexible and practical time periods under the safe harbour rules could further contribute to it. The aid should be based on the financing needs and time periods which are usual in practice. In the financing of physical structures, machine purchases, etc. the financing period is usually over 10 years, sometimes even 20 years, as it always corresponds to the useful life of facilities or equipment.

8.2. Policy Context

The *de minimis* Regulation was one of the first documents adopted under the State aid Modernisation Package in 2013. Its objective is to further simplify the granting of small aid awards, (below EUR 200,000). The current *de minimis* regulation also allows the granting of *de minimis* aid (in the form of grants) to enterprises in difficulty.

The *de minimis* Regulation further simplifies the notion of 'single undertaking'. The latter comprises and is limited to all linked enterprises which form a group (de jure control). De facto control is not to be taken into consideration for the purpose of verifying compliance with the *de minimis* threshold. The current *de minimis* definition is thus much simpler to apply than the definition of 'undertaking' based on the general control principle proposed by the Court that applied to the previous *de minimis* Regulation.

Article 4.6(a) sets a maximum duration of ten years for the *safe harbour* for

loans/guarantees. This limitation is necessary to ensure the proper calculation of the cost of the guarantee, namely that the gross grant equivalent (GGE) of a guarantee depends both on the amount and on the duration. Also, 10 years is the longest period for which a reasonable estimation as regards the GGE could be made (based on a net default rate of 13%).

However, this does not mean that longer time periods are excluded. It has to be taken into consideration that undertakings also have two other possibilities for the calculation of the GGE of a guarantee:

- Calculation on the basis of a safe-harbour premium laid down in a Commission notice (OJ C 155/10 of 20 June 2008) which foresees a specific premium of 3.8% for SME schemes with a guaranteed amount up to EUR 2.5 million per company without any restriction on duration.

- a methodology determined by the Member State (several Member States including Germany have such methodologies in place e.g. as used by guarantee banks in Germany)