

**Commission notice on  
the application of Articles 92 and 93 of the EC Treaty  
to State Aid in the form of guarantees**

*Informal comments  
by UNICE's working group on State Aid*

In recent years the Commission has given priority to efforts aimed at reducing harmful aid in the Union and at enhancing discipline by Member States in the state aid field. One area where substantial volumes of potential state aid remain unnotified, and therefore uncontrolled, lies in the field of loan guarantees. The existing guidelines, issued in the form of two short letters, do not give adequate guidance regarding, for example, the question of whether or not a state guarantee has an aid element or not.

However, there is no doubt that state guarantees on non-commercial terms constitute aid within the meaning of article 92 (1) and must therefore be notified. This conclusion can be drawn from the general principles laid down in Articles 92 and 93 and is confirmed by the guidelines. (The existing guidelines even regard all state guarantees as aid.) Furthermore, the guidelines do not contradict the general principle that unnotified and incompatible aid, also in the form of a guarantee, must be repaid.

In spite of this, Member States have, to a large extent, been granting guarantees without notifying them. In a letter to Commissioner Van Miert dated 10 March 1997, UNICE referred to estimates which suggested that the amount of outstanding state guarantees in the Community was approximately between 5 and 8 times the ECU 44 bn of notified state aid to industry every year. Of course, both commercial and non-commercial guarantees are included in this figure. It is self-evident, that even in the event that only a minor part of these guarantees being subsidised, there is a considerable risk that competition is distorted.

Thus, the need for better discipline and more clearly defined guidelines is urgent. UNICE therefore welcomes the new draft guidelines prepared by the Commission, which are well balanced and clearly expressed. UNICE urges that the new guidelines should be promulgated as rapidly as possible, so that all future guarantees are brought into immediate conformity with EU law.

In relation to existing non-commercial guarantees, UNICE similarly believes that these should be brought into line with the law as clarified in the draft guidelines, because completion of the single market would otherwise be endangered. The fact that the existing guidelines are short and unspecific does not of itself justify failing to bring existing guarantees into conformity with state aid disciplines.

Similarly, any aid element in existing guarantees, and in guarantees granted in the past but no longer in force, should of course be repaid if the aid is found to be incompatible with Article 92.

UNICE would however be sympathetic to one exception to this principle, given that the actual volume of incompatible state aid in the form of guarantees is currently unknown. It is conceivable that, in the case of major guarantee schemes which the Commission found to contain incompatible aid, insistence on full and immediate recovery of the aid could seriously threaten banking confidence. In such a case the Commission should be able to use discretionary powers, meaning in practice that aid may be repaid more slowly or, in exceptional cases, not at all, if that might be necessary to preserve banking confidence. Opting for this possibility may also be necessary in order to ensure that Member States notify guarantees granted in the past during the transitional period to a large extent.

In order to limit the application of such powers to cases where it is absolutely necessary, the Commission should in each case where discretion is applied, demonstrate that banking confidence would otherwise have been threatened.

Considering the difficulty of assessing whether a state guarantee comprises aid, Member States should be instructed to notify guarantees also in the event that there might be uncertainty as to whether or not a guarantee constitutes aid. This should be set out in the guidelines.

UNICE fully supports the concept of a transitional period whereby lenders would not become liable for repayment of any money received from the state in respect of guarantees containing incompatible aid that had previously been invoked, provided that the guarantees and payments had been notified during that period and that recovery procedures are pursued against the borrowers (6.4.3 in the draft guidelines). UNICE does however believe that the transition period should be extended to eighteen months in order to have a smooth transition for bringing past guarantees into line with the rules.

Moreover, if a bank informs the Commission during the transitional period of all the conditions and relevant circumstances of a guarantee (or guarantee scheme) granted in the past and containing incompatible aid, but the Member State concerned abstains from notifying (or fails to notify completely), then that bank should not be forced to repay money received from that state when the guarantee was invoked. Instead, the Commission should institute a procedure aimed at recovering the aid from the borrower.

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