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## COMMUNICATION FROM THE COMMISSION

### **Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty**

(Text with EEA relevance)

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## 1. INTRODUCTION

1. In these guidelines, the Commission sets out the conditions under which State aid for rescuing and restructuring undertakings in difficulty may be considered to be compatible with the internal market on the basis of Article 107(3)(c) of the Treaty on the Functioning of the European Union.
2. The Commission adopted its original Community Guidelines on State aid for rescuing and restructuring firms in difficulty<sup>1</sup> in 1994. In 1997, the Commission added specific rules for agriculture<sup>2</sup>. A modified version of the guidelines was adopted in 1999<sup>3</sup>. In 2004 the Commission adopted a new version of the guidelines<sup>4</sup>, whose validity was first extended until 9 October 2012<sup>5</sup> and subsequently until their replacement by new rules<sup>6</sup> in line with the reform programme set out in the Commission Communication of 8 May 2012 on EU State aid modernisation<sup>7</sup>.
3. In that Communication, the Commission announced three objectives in respect of modernising State aid control:
  - (a) to foster sustainable, smart and inclusive growth in a competitive internal market;
  - (b) to focus Commission *ex ante* scrutiny on cases with the biggest impact on the internal market while strengthening the cooperation with Member States in State aid enforcement;
  - (c) to streamline the rules and provide for faster decisions.
4. In particular, the Communication called for a common approach to the revision of the different guidelines and frameworks, based on strengthening the internal market, promoting more effectiveness in public spending through a better contribution of State aid to objectives of common interest and greater scrutiny of the incentive effect, limitation of aid to the minimum and avoiding the potential negative effects of the aid on competition and trade.
5. The Commission has reviewed these guidelines on the basis of its experience in applying the existing rules and in line with the common approach referred to above. The revision also takes into account the Europe 2020 strategy adopted by the Commission and the fact that the negative effects of State aid might interfere with the need to boost productivity and growth, preserve equal opportunities for undertakings and combat national protectionism.

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<sup>1</sup> OJ C 368, 23.12.1994, p. 12.

<sup>2</sup> OJ C 283, 19.9.1997, p. 2.

<sup>3</sup> OJ C 288, 9.10.1999, p. 2.

<sup>4</sup> OJ C 244, 1.10.2004, p. 2.

<sup>5</sup> OJ C 156, 9.7.2009, p. 3.

<sup>6</sup> OJ C 296, 2.10.2012, p. 3.

<sup>7</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU State aid modernisation (SAM), COM(2012) 209 final.

6. Rescue and restructuring aid are among the most distortive types of State aid. It is well established that successful sectors of the economy witness productivity growth not because all the undertakings present in the market gain in productivity, but rather because the more efficient and technologically advanced undertakings grow at the expense of those that are less efficient or that have obsolete products. Exit of less efficient undertakings allows their more efficient competitors to grow and returns assets to the market, where they can be applied to more productive uses. By interfering with this process, rescue and restructuring aid may significantly slow economic growth in the sectors concerned.
7. Where parts of a failing undertaking remain essentially viable, the undertaking may be able to carry out a restructuring that leads to its exit from certain structurally loss-making activities and allows the remaining activities to be reorganised on a basis that gives a reasonable prospect of long-term viability. Such restructuring should usually be possible without State aid, through agreements with creditors or by means of insolvency or reorganisation proceedings. Modern insolvency law should help sound companies to survive, help safeguard jobs and enable suppliers to keep their customers, and allow owners to retain value in viable companies<sup>8</sup>. Insolvency proceedings may also return a viable undertaking to the market by way of acquisition by third parties, whether of the undertaking as a going concern or its various production assets.
8. It follows that undertakings should only be eligible for State aid when they have exhausted all market options and where such aid is necessary in order to achieve a well-defined objective of common interest that could not be achieved without the aid. Undertakings should be allowed to receive aid under these guidelines only once within ten years (the ‘one time, last time’ principle).
9. A further concern is the moral hazard problem created by State aid. Undertakings anticipating that they are likely to be rescued when they run into difficulty may embark upon excessively risky and unsustainable business strategies. In addition, the prospect of rescue and restructuring aid for a given undertaking may artificially reduce its cost of capital, giving it an undue competitive advantage in the marketplace.
10. State aid for rescuing and restructuring undertakings in difficulty may also undermine the internal market by shifting an unfair share of the burden of structural adjustment and the attendant social and economic problems to other Member States. This is undesirable in itself and may set off a wasteful subsidy race among Member States. Such aid may also lead to the creation of entry barriers and the undermining of incentives for cross-border activities, contrary to the objectives of the internal market.
11. It is therefore important to ensure that aid is only allowed under conditions that mitigate the potential harmful effects and promote effectiveness in public spending. In relation to restructuring aid, the requirements of return to viability, own contribution or burden sharing and measures to limit distortions of competition have

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<sup>8</sup> Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: A new European approach to business failure and insolvency, COM(2012) 742 final.

proved their value in terms of mitigating the potential harmful effects of such aid. They continue to apply under these guidelines, amended as necessary to take account of the Commission's recent case experience. In the case of rescue aid and temporary restructuring support, potential harmful effects are mitigated by means of restrictions on the duration and form of aid.

12. Where aid takes the form of liquidity assistance that is limited in both amount and duration, concerns about its potential harmful effects are much reduced, allowing it to be approved on less stringent conditions. While such aid could in principle be used to support an entire restructuring process, the limitation of the rescue aid period to six months means that this rarely happens; instead, rescue aid is commonly followed by restructuring aid.
13. To encourage the use of less distortive forms of aid, these guidelines introduce a new concept of 'temporary restructuring support'. In common with rescue aid, temporary restructuring support can only take the form of liquidity assistance that is limited in both amount and duration. To allow it to support an entire restructuring process, however, the maximum duration of temporary restructuring support is extended to [12] [18] months. Temporary restructuring support may only be granted to SMEs<sup>9</sup>, which face greater challenges than large undertakings in terms of access to liquidity. Given its purpose of supporting an entire restructuring process, temporary restructuring support may not be followed by rescue or restructuring aid.
14. Where aid to providers of services of general economic interest ('SGEI') in difficulty falls under these guidelines, the assessment should be carried out in accordance with the standard principles of the guidelines. However, the specific application of those principles should be adapted where necessary to take account of the specific nature of SGEI and, in particular, of the need to ensure continuity of service provision in accordance with Article 106(2) of the Treaty.
15. The Commission's Action Plan for a competitive and sustainable steel industry in Europe<sup>10</sup> ('Steel Action Plan'), sets out a series of actions that aim to promote a strong and competitive steel sector. The Steel Action Plan also identifies a number of areas in which State support is available to undertakings in the steel sector in accordance with the State aid rules. However, in the present conditions of significant European and global overcapacity<sup>11</sup>, State aid for rescuing and restructuring steel undertakings in difficulty is not justified. The steel sector should therefore be excluded from the scope of these guidelines.
16. The current EU rules laid down in Council Decision (2010/787/EU) on State aid to facilitate the closure of uncompetitive coal mines set out the conditions under which operating, social and environmental aid may be granted until 2027 to uncompetitive production in the coal sector<sup>12</sup>. The current EU rules follow previous sector-specific

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<sup>9</sup> For the purposes of these guidelines, 'SME', small enterprise' and 'medium-sized enterprise' have the meanings given to those terms in Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

<sup>10</sup> Communication from the Commission to the Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan for a competitive and sustainable steel industry in Europe, COM(2013) 407.

<sup>11</sup> Steel Action Plan, p. 3.

<sup>12</sup> OJ L 336, 21.12.2010, p. 24.

rules applied between 2002 and 2010<sup>13</sup> and 1993 and 2002<sup>14</sup>, which allowed and facilitated the restructuring of uncompetitive undertakings active in the coal sector. As a result, and in view of the persistent need of support for structural adjustment of EU coal production, the current rules are stricter than previous ones and require the permanent cessation of production and sale of aided coal production and the definitive closure of uncompetitive production units by 31 December 2018 at the latest. In application thereof, several Member States have adopted and are implementing plans leading to the definitive closure of coal mines in difficulty operated by undertakings in this sector<sup>15</sup>. The coal sector should therefore be excluded from the scope of these guidelines.

17. The Commission's experience with the rescue and restructuring of financial institutions during the current financial and economic crisis has shown that specific rules applicable to the financial sector can be beneficial in view of the specific characteristics of financial institutions and financial markets. These guidelines therefore do not apply to undertakings covered by dedicated rules for the financial sector.

## 2. SCOPE OF THE GUIDELINES

### 2.1. Sectoral scope

18. These guidelines apply to aid for all undertakings in difficulty, except to those operating in the coal sector<sup>16</sup> or the steel sector<sup>17</sup> and those covered by specific rules for financial institutions<sup>18</sup>, without prejudice to any specific rules relating to undertakings in difficulty in a particular sector<sup>19</sup>. With the exception of point 111<sup>20</sup>, they apply to the fisheries and aquaculture sector, subject to compliance with the specific rules laid down in the Guidelines for the examination of State aid to fisheries and aquaculture<sup>21</sup>. These guidelines apply to the agricultural sector, with the exception of point 111, which does not apply to primary agricultural producers<sup>22</sup>.

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<sup>13</sup> Council Regulation (EC) No 1407/2002 (OJ L 205, 2.8.2002, p.1).

<sup>14</sup> Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for state aid to the Coal Industry (OJ L 329, 30.12.1993, p.12).

<sup>15</sup> See Commission Decisions in cases N 175/2010 - Slovenia, SA 33013 - Poland, N 708/2007 - Germany, SA 33033 - Romania and SA 33861 - Hungary.

<sup>16</sup> As defined in the Council Decision of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines (OJ L 336, 21.12.2010, p. 24).

<sup>17</sup> As defined in Annex IV to the Communication from the Commission: Guidelines on regional state aid for 2014-2020, OJ C 209, 23.7.2013, p. 1.

<sup>18</sup> Communication from the Commission on the application, from 1 August 2013, of the State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication'), OJ C 216, 30.7.2013, p. 1.

<sup>19</sup> Specific rules of this nature exist for the rail freight sector (OJ C 184, 22.7.2008, p. 13).

<sup>20</sup> In other words, awards of aid under schemes to undertakings that do not fulfil the conditions set out in point 21 may nevertheless be exempted from individual notification.

<sup>21</sup> Guidelines for the examination of State aid to fisheries and aquaculture (OJ C 84, 3.4.2008).

<sup>22</sup> For the purposes of these Guidelines, 'primary agricultural producers' means all operators involved in the primary production of the products listed in Annex I to the Treaty, with the exception of fishery and aquaculture products listed in Annex I to Regulation (EU) No [...] on the common organisation of the markets in fishery and aquaculture products.



## 2.2. Meaning of ‘undertaking in difficulty’

19. A Member State which proposes to grant aid under these guidelines to an undertaking must demonstrate on objective grounds that the undertaking concerned is in difficulty within the meaning of this section.
20. For the purposes of these guidelines, an undertaking is considered to be in difficulty when, without intervention by the State, it will almost certainly be condemned to going out of business in the short or medium term.
21. In particular, an undertaking is considered to be in difficulty if at least one of the following circumstances occurs:
- (a) In the case of a limited liability company<sup>23</sup>, where more than half of its subscribed share capital<sup>24</sup> has disappeared as a result of accumulated losses. This is the case when deduction of accumulated losses from reserves (and all other elements generally considered as part of the own funds of the company) leads to a negative result that exceeds half of the subscribed share capital.
  - (b) In the case of a company where at least some members have unlimited liability for the debt of the company<sup>25</sup>, where more than half of its capital as shown in the company accounts has disappeared as a result of accumulated losses.
  - (c) Where the undertaking is subject to collective insolvency proceedings or fulfils the criteria under its domestic law for being placed in collective insolvency proceedings at the request of its creditors.
  - (d) Where the undertaking is rated the equivalent of CCC+ (‘payment capacity is dependent upon sustained favourable conditions’) or below by at least one registered credit rating agency<sup>26</sup>.
  - (e) Where:
    - (1) the undertaking’s book debt to equity ratio is greater than [7.5] [and]/[or]
    - (2) the undertaking’s [EBIT]/[EBITDA] interest coverage ratio has been below [1.0] for the past [two] years.
22. Where none of the circumstances set out in point 21 applies, the Commission may exceptionally consider that an undertaking is in difficulty if there is evidence that without intervention by the State, the undertaking will almost certainly be condemned to going out of business in the short or medium term. Such evidence should demonstrate that the undertaking is facing a similar degree of difficulty to that

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<sup>23</sup> This refers in particular to the types of company mentioned in the first subparagraph of Article 1(1) of Council Directive 78/660/EEC of 25 July 1978 (OJ L 222, 14.8.1978, p. 11) with subsequent amendments.

<sup>24</sup> Where relevant, ‘share capital’ includes any share premium.

<sup>25</sup> This refers in particular to the types of company mentioned in the second subparagraph of Article 1(1) of Council Directive 78/660/EEC, with subsequent amendments.

<sup>26</sup> ‘Registered credit rating agency’ means a credit rating agency registered in accordance with Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies (OJ L 302, 17.11.2009, p. 1).

implied by the circumstances set out in point 21. In any such case, the Commission will only find that the undertaking is in difficulty if it is shown to be unable to attract market funding or capital to resolve its liquidity problems without State intervention, for example by raising adequate finance from owners/shareholders, creditors and other private lenders, agreeing a private workout of its debts, or procuring a sale of the business to a new investor. This is deemed to be shown if, for example, an application for credit or capital has been rejected by several institutions (such as the undertaking's main bank or potential investors).

23. Given that its very existence is in danger, an undertaking in difficulty cannot be considered an appropriate vehicle for promoting other public policy objectives until such time as its viability is assured. A number of Commission regulations and communications in the field of State aid and elsewhere therefore prohibit undertakings in difficulty from receiving aid. For the purposes of such regulations and communications, and unless otherwise defined therein:
- (a) 'undertakings in difficulty' or 'firms in difficulty' shall be understood to mean undertakings in difficulty within the meaning of points 20 to 22 of these guidelines, except that point 22 shall not apply in the case of Commission regulations or in relation to aid under schemes, and
  - (b) an SME that has been in existence for less than three years will not be considered to be in difficulty with regard to that period unless it meets the condition set out in point 21(c).
24. The Commission will pay particular attention to the need to prevent the use of these guidelines to circumvent the principles laid down in existing frameworks and guidelines.
25. A newly created undertaking is not eligible for aid under these guidelines even if its initial financial position is insecure. This is the case, for instance, where a new undertaking emerges from the liquidation of a previous undertaking or merely takes over that undertaking's assets. An undertaking will in principle be considered as newly created for the first three years following the start of operations in the relevant field of activity. Only after that period will it become eligible for aid under these guidelines, provided that:
- (a) it qualifies as an undertaking in difficulty within the meaning of these guidelines, and
  - (b) it does not form part of a larger business group<sup>27</sup> except under the conditions laid down in point 26.
26. A company belonging to or being taken over by a larger business group is not normally eligible for aid under these guidelines, except where it can be demonstrated that the company's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be

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<sup>27</sup> To determine whether a company is independent or forms part of a group, the criteria laid down in Annex I to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36) will be taken into account.

dealt with by the group itself. Where a company in difficulty creates a subsidiary, the subsidiary, together with the company in difficulty controlling it, will be regarded as a group and may receive aid under the conditions laid down in this point.

### **2.3. Rescue aid, restructuring aid and temporary restructuring support**

27. These guidelines deal with three types of aid: rescue aid, restructuring aid and temporary restructuring support.

28. Rescue aid is by nature temporary assistance. Its primary objective is to make it possible to keep an ailing undertaking afloat for the time needed to work out a restructuring or liquidation plan. The general principle is that rescue aid makes it possible to provide temporary support to an undertaking facing a serious deterioration of its financial situation, involving an acute liquidity crisis or technical insolvency. Such temporary support should allow time to analyse the circumstances which gave rise to the difficulties and to develop an appropriate plan to remedy those difficulties.

29. Restructuring aid must restore the long-term viability of the beneficiary on the basis of a feasible, coherent and far-reaching restructuring plan, while at the same time allowing for adequate burden sharing and limiting the potential distortions of competition.

30. Temporary restructuring support is liquidity assistance designed to support the restructuring of an undertaking by providing the conditions needed for the beneficiary to design and implement appropriate action to restore its long-term viability. Temporary restructuring support may only be granted to SMEs.

### **2.4. Aid to cover the social costs of restructuring**

31. Restructuring normally entails reductions in or abandonment of the affected activities. Such retrenchments are often necessary in the interests of rationalisation and efficiency, quite apart from any capacity reductions that may be required as a condition for granting aid. Regardless of the underlying reasons, such measures will generally lead to reductions in the beneficiary's workforce.

32. Member States' labour legislation may include general social security schemes under which redundancy benefits and early retirement pensions are paid directly to redundant employees. Such schemes are not to be regarded as State aid falling within the scope of Article 107(1) of the Treaty.

33. Besides direct redundancy benefit and early retirement provision for employees, general social support schemes frequently provide for the government to cover the cost of benefits which an undertaking grants to redundant workers and which go beyond its statutory or contractual obligations. Where such schemes are available generally without sectoral limitations to any worker meeting predefined and automatic eligibility conditions, they are not deemed to involve aid under Article 107(1) for undertakings carrying out restructuring. On the other hand, if the schemes

are used to support restructuring in particular industries, they may well involve aid because of the selective way in which they are used<sup>28</sup>.

34. The obligations an undertaking itself bears under employment legislation or collective agreements with trade unions to provide redundancy benefits and/or early retirement pensions are part of the normal costs of business which an undertaking must meet from its own resources. That being so, any contribution by the State to these costs must be counted as aid. This is true regardless of whether the payments are made direct to the undertaking or are administered through a government agency to the employees.
35. The Commission has no *a priori* objection to such aid when it is granted to an undertaking in difficulty, for it brings economic benefits above and beyond the interests of the undertaking concerned, facilitating structural change and reducing hardship.
36. Besides meeting the cost of redundancy payments and early retirement, aid is commonly provided in connection with a particular restructuring scheme for training, counselling and practical help with finding alternative employment, assistance with relocation, and professional training and assistance for employees wishing to start new businesses. The Commission consistently takes a favourable view of such aid when it is granted to undertakings in difficulty.

### **3. COMPATIBILITY WITH THE INTERNAL MARKET**

37. The circumstances under which State aid may be regarded as compatible with the internal market are set out in Article 107(2) and (3) of the Treaty. Under Article 107(3)(c), the Commission has the power to authorise ‘aid to facilitate the development of certain economic activities (...) where such aid does not adversely affect trading conditions to an extent contrary to the common interest’. In particular, this could be the case where the aid is necessary to correct disparities caused by market failures or to ensure economic and social cohesion.
38. As a general principle, aid measures must be notified individually to the Commission. Under certain conditions, the Commission may authorise schemes for smaller amounts of aid: those conditions are set out in chapter 6.
39. In assessing whether notified aid can be deemed compatible with the internal market, the Commission will consider whether each of the following criteria is met:
  - (a) Contribution to a well-defined objective of common interest: a State aid measure must aim at an objective of common interest in accordance with Article 107(3) of the Treaty (section 3.1).

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<sup>28</sup> In its judgment in Case C-241/94 *France v Commission* [1996] ECR I-4551 (Kimberly Clark Sopalin), the Court of Justice confirmed that the system of financing on a discretionary basis by the French authorities, through the National Employment Fund, was liable to place certain undertakings in a more favourable situation than others and thus to qualify as aid within the meaning of Article 107(1) of the Treaty. (The Court’s judgment did not call into question the Commission’s conclusion that the aid was compatible with the internal market).

- (b) Need for State intervention: a State aid measure must be targeted towards a situation where aid can bring about a material improvement that the market cannot deliver itself, for example by remedying a market failure or addressing an equity or cohesion concern (section 3.2).
  - (c) Appropriateness of the aid measure: an aid measure will not be considered compatible if other, less distortive measures allow the same objective to be achieved (section 3.3).
  - (d) It must be shown that in the absence of the aid, the beneficiary would have been restructured, sold or wound up in a way that would not have achieved the objective of common interest (incentive effect) (section 3.4).
  - (e) Proportionality of the aid (aid limited to the minimum): the aid must not exceed the minimum needed to achieve the objective of common interest (section 3.5).
  - (f) Avoidance of undue negative effects on competition and trade between Member States: the negative effects of aid must be sufficiently limited, so that the overall balance of the measure is positive (section 3.6).
  - (g) Transparency of aid: Member States, the Commission, economic operators and the public must have easy access to all relevant acts and pertinent information about the aid awarded (section 3.7).
40. If at least one of the above criteria is not met, the aid will not be considered to be compatible with the internal market.
41. The overall balance of certain categories of schemes may also be made subject to a requirement of *ex post* evaluation, as described in points 113 to 115 of these guidelines.
42. Moreover, if an aid measure or the conditions attached to it (including its financing method when that forms an integral part of it) entails a non-severable violation of EU law, the aid cannot be declared compatible with the internal market<sup>29</sup>.
43. In this chapter, the Commission sets out the conditions under which it will assess each of the criteria referred to in point 39.

### **3.1. Contribution to an objective of common interest**

44. Given the importance of market exit to the process of productivity growth, merely preventing an undertaking from exiting the market does not constitute a sufficient justification for aid. Clear evidence should be provided that aid pursues an objective of common interest, in that it aims to prevent social hardship or address market failures (section 3.1.1) by restoring the long-term viability of the undertaking (section 3.1.2).

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<sup>29</sup> See for instance Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 78 and Case C-333/07 *Régie Networks v Rhone Alpes Bourgogne* [2008] ECR I-10807, paragraphs 94-116.

### 3.1.1. *Demonstration of social hardship or market failure*

45. Member States must demonstrate that the failure of the beneficiary would be likely to involve serious social hardship or severe market failure, in particular:
- (a) the fact that the unemployment rate in the region(s) concerned is either:
    - (1) higher than the EU average, persistent and accompanied by the difficulty of creating new employment in the region(s) concerned, or
    - (2) higher than the national average, persistent and accompanied by the difficulty of creating new employment in the region(s) concerned;
  - (b) the risk of disruption to an important service which is hard to replicate and where it would be difficult for any competitor simply to step in (e.g. a national infrastructure provider);
  - (c) the potential negative consequences of the exit of an undertaking with an important systemic role in a particular region or sector (for example as a supplier of an important input);
  - (d) the risk of interruption to the continuity of provision of an SGEI;
  - (e) the failure or adverse incentives of credit markets that would push an otherwise viable undertaking into bankruptcy;
  - (f) where the exit of the undertaking concerned from the market would lead to an irremediable loss of important technical knowledge or expertise; or
  - (g) similar situations of severe hardship duly substantiated by the Member State concerned.
46. The failure of an individual SME is unlikely to involve the degree of social hardship or market failure required for the purposes of point 45. However, there is a greater concern in relation to SMEs that value may be destroyed when SMEs that have the potential to restructure so as to restore their long-term viability are denied the chance to do so by liquidity problems. As regards the grant of aid to SMEs in difficulty, therefore, it is sufficient for a Member State to demonstrate that the failure of the beneficiary would be likely to involve social hardship or market failure, in particular:
- (a) the potential negative consequences of the exit of innovative SMEs or SMEs with high growth potential;
  - (b) the potential negative consequences of the exit of an undertaking with extensive links to other local or regional undertakings, particularly other SMEs;
  - (c) the failure or adverse incentives of credit markets that would push an otherwise viable undertaking into bankruptcy; or
  - (d) similar situations of hardship duly substantiated by the Member State concerned.

### 3.1.2. *Restructuring plan and return to long-term viability*

47. Restructuring aid within the scope of these guidelines cannot be limited to financial aid designed to make good past losses without tackling the reasons for those losses. In the case of restructuring aid, therefore, the Commission will require that the Member State concerned submit a feasible, coherent and far-reaching restructuring plan to restore the beneficiary's long-term viability<sup>30</sup>. Restructuring may involve one or more of the following elements: the reorganisation and rationalisation of the beneficiary's activities on to a more efficient basis, typically involving the withdrawal from loss-making activities, the restructuring of those existing activities that can be made competitive again and, possibly, diversification in the direction of new and viable activities. It typically also involves financial restructuring in the form of capital injections by new or existing shareholders and debt reduction by existing creditors.
48. The grant of the aid must therefore be conditional on implementation of the restructuring plan, which must be endorsed by the Commission in all cases of ad hoc aid. By way of derogation, in the case of ad hoc aid to SMEs, it is the responsibility of the Member State concerned to assess whether the restructuring plan is suitable for restoring the long-term viability of the beneficiary, in accordance with points 49 to 54, and to communicate the results of that assessment to the Commission.
49. The restructuring plan must restore the long-term viability of the beneficiary within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions that should exclude any further State aid not covered by the restructuring plan. The restructuring period should be as short as possible and should not in principle exceed three years<sup>31</sup>. The restructuring plan must be submitted in all relevant detail to the Commission and must include, in particular, the information set out in this section (3.1.2).
50. The restructuring plan must identify the causes of the beneficiary's difficulties and the beneficiary's own weaknesses, and outline how the proposed restructuring measures will remedy the beneficiary's underlying problems.
51. The restructuring plan should provide information on the business model of the beneficiary, demonstrating how the plan will benefit its long-term viability. This should include, in particular, information on the beneficiary's organisational structure, funding, corporate governance and all other relevant aspects. The restructuring plan should assess whether the beneficiary's difficulties could have been avoided through appropriate and timely management action and, where that is the case, should demonstrate that appropriate management changes have been made. Where the beneficiary's difficulties stem from flaws in its business model or corporate governance system, appropriate changes will be required.
52. The expected results of the planned restructuring should be demonstrated under a baseline scenario as well as under a pessimistic (or worst-case) scenario. For this

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<sup>30</sup> An indicative model restructuring plan is set out in Annex 2.

<sup>31</sup> This period may in exceptional cases be extended up to a maximum of five years where the Member State can demonstrate that, due to the specific characteristics of the market concerned, a period of three years is not sufficient for the restoration of viability.

purpose, the restructuring plan should take account, *inter alia*, of the current state and future prospects of supply and demand on the relevant product market and the main cost drivers of the industry, reflecting baseline and adverse scenario assumptions, as well as the beneficiary's specific strengths and weaknesses. Assumptions should be compared with appropriate sector-wide benchmarks and should, where appropriate, be adapted to cater for country- and sector-specific circumstances. The beneficiary should provide a sensitivity analysis identifying the driving parameters of the beneficiary's performance and the main risk factors going forward. Where the beneficiary is a large undertaking, it should also provide a market survey.

53. The beneficiary's return to viability should mainly derive from internal measures, entailing in particular withdrawal from activities which would remain structurally loss-making in the medium term. The return to viability cannot be dependent on optimistic assumptions about external factors such as variation in prices, demand or supply of scarce resources, nor can it be linked to the beneficiary outperforming the market and its competitors or entering and expanding into new activities where it has no experience and track record (unless duly justified and required for reasons of diversification and viability).
54. Long-term viability is achieved when an undertaking is able to provide an appropriate projected return on capital after having covered all its costs including depreciation and financial charges. The restructured undertaking should be able to compete in the marketplace on its own merits.

### **3.2. Need for State intervention**

55. Member States that intend to grant restructuring aid must present a comparison with a credible alternative scenario not involving State aid, demonstrating how the relevant objective or objectives under section 3.1.1 above would not be attained, or would be attained to a lesser degree, in the case of that alternative scenario. Such scenarios may include debt reorganisation, asset disposal, private capital raising, sale to a competitor or break-up, in each case either through entry into an insolvency or reorganisation procedure or otherwise.

### **3.3. Appropriateness**

56. Member States should ensure that aid is awarded in the form that is likely to generate the least distortion of trade and competition. In the case of undertakings in difficulty, that can be achieved by ensuring that aid is in the appropriate form to address the beneficiary's difficulties and that it is properly remunerated. This section sets out the requirements that must be complied with in order to demonstrate that an aid measure is appropriate.

#### *3.3.1. Rescue aid*

57. In order to be approved by the Commission, rescue aid must fulfil the following conditions:
  - (a) It must consist of temporary liquidity support in the form of loan guarantees or loans.



- (b) The financial cost of the loan or, in the case of loan guarantees, the total financial cost of the guaranteed loan, including the interest rate of the loan and the guarantee premium, must comply with point 60.
- (c) Except as otherwise specified in point (d) below, any loan must be reimbursed and any guarantee must come to an end within a period of not more than six months after disbursement of the first instalment to the beneficiary.
- (d) Member States must undertake to communicate to the Commission, not later than six months after the rescue aid measure has been authorised or, in the case of non-notified aid, not later than six months after disbursement of the first instalment to the beneficiary,
  - (1) proof that the loan has been reimbursed in full and/or that the guarantee has been terminated; or
  - (2) a restructuring plan as set out in section 3.1.2; upon submission of a restructuring plan, the authorisation of the rescue aid will be automatically extended until the Commission reaches its final decision on the restructuring plan, unless the Commission decides that such extension is not justified or should be limited in time or scope; once a restructuring plan for which aid has been requested has been put in place and is being implemented, all further aid will be considered as restructuring aid; or
  - (3) a liquidation plan setting out in a substantiated way the steps leading to the liquidation of the beneficiary within a reasonable time frame without further aid.
- (e) Structural measures, such as acquisition or sale of significant businesses or assets, must not be implemented with rescue aid unless they require immediate action.

### 3.3.2. *Restructuring aid*

58. Member States are free to choose the form that restructuring aid takes. However, in doing so, they must ensure that the instrument chosen is appropriate to the issue that it is intended to address. In particular, Member States should assess whether beneficiaries' problems relate to liquidity or solvency and select appropriate instruments to address the problems identified. For instance, in the case of solvency problems, increasing assets through recapitalisation might be appropriate, whereas in a situation where the problems mainly relate to liquidity, assistance through loans or loan guarantees might be sufficient.

### 3.3.3. *Temporary restructuring support for SMEs*

59. In order to be approved by the Commission, temporary restructuring support must fulfil the following conditions:

- (a) The support must consist of aid in the form of loan guarantees or loans.

- (b) The financial cost of the loan or, in the case of loan guarantees, the total financial cost of the guaranteed loan, including the interest rate of the loan and the guarantee premium, must comply with point 60.
- (c) Any loan must be reimbursed and any guarantee must come to an end within a period of not more than [12] [18] months after the disbursement of the first instalment to the beneficiary.
- (d) Not later than six months after the temporary restructuring support has been authorised or, in the case of non-notified aid, not later than six months after the disbursement of the first instalment to the beneficiary, the beneficiary must communicate a simplified restructuring plan to the Member State. That plan need not contain all the elements set out in points 49 to 54, but must, as a minimum, identify the actions that the beneficiary must take to restore its long-term viability without State support.

#### 3.3.4. *Remuneration*

60. The level of remuneration should reflect the underlying creditworthiness of the beneficiary, discounting the temporary effects of both liquidity difficulties and State support, and should provide incentives for the beneficiary to repay the aid as soon as possible. The Commission will therefore require remuneration to be set as follows:

- (a) in the case of rescue aid, at a rate not less than the reference rate set out in the Communication from the Commission on the revision of the method for setting the reference and discount rates<sup>32</sup> for weak undertakings offering normal levels of collateralisation (currently 1-year IBOR plus 400 basis points)<sup>33</sup>;
- (b) during the first six months of a temporary restructuring support measure, at a rate not less than the rate identified in point (a) above, less [50] basis points;
- (c) during the second six months of a temporary restructuring support measure, at a rate not less than the rate identified in point (a) above;
- (d) [IF THE MAXIMUM TEMPORARY RESTRUCTURING SUPPORT PERIOD IS 18 MONTHS: during the final six months of a temporary restructuring support measure, at a rate not less than the rate identified in point (a) above, plus [50] basis points.]

Where there is evidence, in relation to aid granted to a large undertaking, that the rate identified in point (a) above does not represent an appropriate benchmark, for example where it differs substantially from the market pricing of similar instruments recently issued by the beneficiary, the Commission may adapt the required level of remuneration accordingly.

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<sup>32</sup> OJ C 14, 19.1.2008, p. 6.

<sup>33</sup> For the avoidance of doubt, the note regarding remuneration of rescue aid to the table of loan margins contained in that communication no longer has effect from the date of application of these guidelines.

### **3.4. Incentive effect**

61. Member States that intend to grant restructuring aid must demonstrate that in the absence of the aid, the beneficiary would have been restructured, sold or wound up in a way that would not have achieved the objective of common interest. This demonstration can form part of the counterfactual analysis presented in accordance with point 55.

### **3.5. Proportionality of the aid / aid limited to the minimum**

#### *3.5.1. Rescue aid*

62. Rescue aid must be restricted to the amount needed to keep the beneficiary in business for six months; in determining that amount, regard will be had to the outcome of the formula set out in Annex 1; any aid exceeding the result of that calculation will only be authorised if it is duly justified by the provision of a liquidity plan setting out the beneficiary's liquidity needs for the coming six months.

#### *3.5.2. Restructuring aid*

63. The amount and intensity of restructuring aid must be limited to the strict minimum necessary to enable restructuring to be undertaken, in the light of the existing financial resources of the beneficiary, its shareholders or the business group to which it belongs. In particular, a sufficient level of burden sharing must be ensured, as set out in more detail in this section (3.5.2). Such assessment will take account of any rescue aid granted beforehand.

##### *3.5.2.1. [Burden sharing option 1]*

64. A significant contribution<sup>34</sup> to the restructuring is required from the own resources of the aid beneficiary, its shareholders or creditors or the business group to which it belongs. Where the beneficiary's difficulties relate to a shortage of equity capital, that contribution should include measures such as raising fresh equity from incumbent shareholders, the write-down of existing debt and capital notes or the conversion of existing debt to equity, the raising of new private external equity or the sale of assets that are not essential to the beneficiary's survival (to the extent that such sale takes place above book value). Where the beneficiary's difficulties relate to liquidity problems, the contribution should take the form of cash-generating measures such as raising new debt financing at market conditions or selling assets that are not essential to the beneficiary's survival; the cash thus generated should be applied to reducing the volume of loans or loan guarantees required from the State. Contributions must be real, i.e. actual, excluding all future expected profits such as cash flow, and must be as high as possible. Contribution by the State, for example in its capacity as a shareholder or creditor, does not help to address moral hazard concerns or to demonstrate that the markets believe in the feasibility of the return to viability and will therefore not be taken into account for these purposes.

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<sup>34</sup> This contribution must not contain any aid. This is not the case, for instance, where a loan carries an interest-rate subsidy or is backed by government guarantees containing elements of aid.

65. These contributions to the restructuring will normally be considered to be adequate if their amount is at least as high as the aid amount and if the contribution by incumbent shareholders and creditors is reasonable in view of the likely losses that they would have suffered in the event of insolvency. For the purposes of this point (65), the Commission will consider that the total nominal amount of the aid measure constitutes aid, unless the Member State concerned provides objective and verifiable evidence that the aid element is smaller. In exceptional circumstances and in cases of particular hardship, which must be demonstrated by the Member State, the Commission may accept a contribution which is lower than the aid amount.

#### 3.5.2.2. [Burden sharing option 2]

66. A significant contribution<sup>35</sup> to the restructuring is required from the own resources of the aid beneficiary, its shareholders or creditors or the business group to which it belongs. Where the beneficiary's difficulties relate to a shortage of equity capital, that contribution should include measures such as raising fresh capital from incumbent shareholders, the write-down of existing debt and capital notes or the conversion of existing debt to equity, the raising of new private external equity or the sale of assets that are not essential to the beneficiary's survival (to the extent that such sale takes place above book value). Where the beneficiary's difficulties relate to liquidity problems, the contribution should take the form of cash-generating measures such as raising new debt financing at market conditions or selling assets that are not essential to the beneficiary's survival; the cash thus generated should be applied to reducing the volume of loans or loan guarantees required from the State). Contributions must be real, i.e. actual, excluding all future expected profits such as cash flow, and must be as high as possible. Contribution by the State, for example in its capacity as a shareholder or creditor, does not help to address moral hazard concerns or to demonstrate that the markets believe in the feasibility of the return to viability and will therefore not be taken into account for these purposes.
67. These contributions to the restructuring will normally be considered to be adequate if their amount is at least 50% of the restructuring costs. In exceptional circumstances and in cases of particular hardship, which must be demonstrated by the Member State, the Commission may accept a contribution of less than 50% of the restructuring costs.
68. Where State support is given in respect of restructuring costs that involve coverage of past losses, for example where the State provides grants, injects capital or writes off debt in order to restore the beneficiary's capital position, this has the effect of protecting investors from the consequences of their choice to invest in the beneficiary. That can create moral hazard and undermine market discipline. Consequently, aid to cover past losses should only be granted on terms which involve adequate burden sharing by existing investors.
69. Adequate burden sharing will normally mean that incumbent shareholders must bear past losses in full. If shareholders' claims are insufficient to fully cover such losses, those that remain must be borne by subordinated debt holders, either via conversion into equity or write-down of the principal of the instruments. In any case, cash

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<sup>35</sup> This contribution must not contain any aid. This is not the case, for instance, where a loan carries an interest-rate subsidy or is backed by government guarantees containing elements of aid.

outflows from the beneficiary to holders of equity or subordinated debt must be prevented to the extent legally possible. Contributions by shareholders and creditors under this point may be counted towards the threshold set out in point 67.

70. If the measures set out in point 69 are insufficient to cover past losses, the Commission will not require a contribution by senior debt holders. However, it may treat any such contribution as grounds for a reduction in the necessary degree of competition measures in accordance with point 94.
71. The Commission may allow exceptions from full implementation of the measures set out in point 69 where those measures would otherwise lead to disproportionate results. Such situations could include cases where the aid amount is small in comparison with the degree of burden sharing, or the Member State concerned demonstrates that subordinated creditors would receive less in economic terms than under normal insolvency proceedings and if no State aid were granted.

### 3.5.3. *Temporary restructuring support for SMEs*

72. Temporary restructuring support must be restricted to the amount needed to keep the beneficiary in business for [12] [18] months; in determining that amount regard will be had to the outcome of the formula set out in Annex 1; any aid exceeding [twice] [three times] the result of that calculation will only be authorised if it is duly justified by the provision of a liquidity plan setting out the beneficiary's liquidity needs for the coming [12] [18] months.

## 3.6. **Negative effects**

### 3.6.1. *'One time, last time' principle*

73. In order to reduce moral hazard, excessive risk-taking incentives and potential competitive distortions, rescue aid, restructuring aid and temporary restructuring support should be granted in respect of only one restructuring operation. This is referred to as the 'one time, last time' principle. The need for an undertaking that has already received rescue aid, restructuring aid or temporary restructuring support to obtain further such aid demonstrates that the undertaking's difficulties are either of a recurrent nature or were not dealt with adequately when the earlier aid was granted. Repeated State interventions are likely to lead to problems of moral hazard and distortions of competition that are contrary to the common interest.
74. When planned rescue aid, restructuring aid or temporary restructuring support is notified to the Commission, the Member State must specify whether the undertaking concerned has already received rescue aid, restructuring aid or temporary restructuring support in the past, including any such aid granted before the date of application of these guidelines and any non-notified aid<sup>36</sup>. If so, and where less than 10 years<sup>37</sup> have elapsed since the rescue aid or temporary restructuring support was granted or the restructuring period came to an end or implementation of the

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<sup>36</sup> With regard to non-notified aid, the Commission will take account in its appraisal of the possibility that the aid could have been declared compatible with the internal market otherwise than as rescue or restructuring aid or temporary restructuring support.

<sup>37</sup> Five years in the case of primary agricultural producers.

restructuring plan was halted (whichever occurred the latest), the Commission will not allow further rescue aid, restructuring aid or temporary restructuring support.

75. Exceptions to that rule are permitted in the following cases:
- (a) where restructuring aid follows the granting of rescue aid as part of a single restructuring operation;
  - (b) where rescue aid or temporary restructuring support has been granted in accordance with these guidelines and this aid was not followed by restructuring aid, if:
    - (1) the beneficiary could reasonably be believed to be viable in the long term following the granting of rescue aid or temporary restructuring support, and
    - (2) new rescue or restructuring aid or temporary restructuring support becomes necessary after at least five years due to unforeseeable circumstances<sup>38</sup> for which the beneficiary is not responsible;
  - (c) in exceptional and unforeseeable circumstances for which the beneficiary is not responsible.
76. The application of this rule will in no way be affected by any changes in ownership of the beneficiary following the grant of aid or by any judicial or administrative procedure which has the effect of putting its balance sheet on a sounder footing, reducing its liabilities or wiping out its previous debts where it is the same undertaking that is continuing in business.
77. Where a business group has received rescue aid, restructuring aid or temporary restructuring support, the Commission will normally not allow further rescue aid, restructuring aid or temporary restructuring support to the group itself or any of the entities belonging to the group unless 10 years have elapsed since the rescue aid or temporary restructuring support was granted or the restructuring period came to an end or implementation of the restructuring plan was halted, whichever occurred the latest. Where an entity belonging to a business group has received rescue aid, restructuring aid or temporary restructuring support, the group as a whole as well as the other entities of the group remain eligible for rescue or restructuring aid or temporary restructuring support (subject to compliance with the other provisions of these guidelines), with the exception of the earlier beneficiary of the aid. Member States must demonstrate that no aid will be passed on from the group or other group entities to the earlier beneficiary of the aid.
78. Where an undertaking takes over assets of another undertaking, and in particular one that has been the subject of one of the procedures referred to in point 76 or of collective insolvency proceedings brought under national law and has already received rescue or restructuring aid or temporary restructuring support, the purchaser

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<sup>38</sup> An unforeseeable circumstance is one which could in no way be anticipated by the beneficiary's management when the restructuring plan was drawn up and which is not due to negligence or errors of the beneficiary's management or decisions of the group to which it belongs.

is not subject to the ‘one time, last time’ requirement, provided that there is no economic continuity between the old undertaking and the purchaser<sup>39</sup>.

### 3.6.2. *Measures to limit distortions of competition*

79. In order to ensure that adverse effects on trading conditions are minimised as much as possible, so that positive effects outweigh any adverse ones, measures to limit distortions of competition must be taken. The Commission will assess the appropriate form and scope of such measures in accordance with this section (3.6.2).

#### 3.6.2.1. Nature and form of competition measures

80. Measures to limit distortions of competition will usually take the form of structural measures (except as set out in point 87). Where appropriate to address the distortions of competition in particular cases, the Commission may accept behavioural measures other than those set out in point 87 or market opening measures in place of some or all of the structural measures that would otherwise be required.

#### *Structural measures – divestments and reduction of business activities*

81. On the basis of an assessment in accordance with the criteria for calibration of competition measures (set out in section 3.6.2.2), undertakings benefiting from restructuring aid may be required to divest assets or reduce capacity or market presence. Such measures should take place in particular in the market or markets where the undertaking will have a significant market position after restructuring, in particular those where there is significant excess capacity. Divestments to limit distortions of competition should take place without undue delay, taking into account the type of asset being divested and any obstacles to its disposal<sup>40</sup>, and in any case within the duration of the restructuring plan. Divestments, write-offs and closure of loss-making activities which would at any rate be necessary to restore viability are generally not sufficient, in the light of the principles set out in section 3.6.2.2, to address distortions of competition.

82. In order for such measures to strengthen competition and contribute to the internal market, they should favour the entry of new competitors, the expansion of existing small competitors or cross-border activity. Retrenchment within national borders and fragmentation of the internal market should be avoided.

83. Competition measures should not lead to a deterioration in the structure of the market. Structural measures should therefore normally take the form of divestments on a going concern basis of viable stand-alone businesses that, if operated by a suitable purchaser, can compete effectively in the long term. In the event that such an entity is not available, the beneficiary could carve out and subsequently divest an existing and appropriately funded activity, creating a new and viable entity that

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<sup>39</sup> See Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia v Commission* [2003] ECR I-4035; Joined Cases T-415/05, T-416/05 and T-423/05 *Greece and others v Commission* [2010] ECR II-4749; Case T-123/09 *Ryanair v Commission*, nyr (confirmed on appeal by the European Court of Justice in Case C-287/12 P, nyr).

<sup>40</sup> For example, sale of a portfolio or of individual assets may be possible, and should therefore take place, in a significantly shorter time than sale of a business as a going concern, particularly when that business must first be carved out from a wider entity.

should be able to compete in the market. Structural measures that take the form of divestment of assets alone and do not involve the creation of a viable entity able to compete in the market are less effective in preserving competition and will therefore only be accepted in exceptional cases where the Member State concerned demonstrates that no other form of structural measures would be feasible or that other structural measures would seriously jeopardise the economic viability of the undertaking.

84. The beneficiary should facilitate divestitures, for example through ring-fencing of activities and by agreeing not to solicit clients of the divested business.
85. Where it appears that it may be difficult to find a buyer for the assets which a beneficiary proposes to divest, it will be required to identify alternative divestments or measures to be taken in relation to the market or markets concerned if the primary divestment fails.

#### *Behavioural measures*

86. Behavioural measures aim at ensuring that aid is used only to finance the restoration of long-term viability and that it is not abused to prolong serious and persistent market structure distortions or to shield the beneficiary from healthy competition.
87. The following measures must be applied in all cases, to avoid undermining the effects of structural measures. These behavioural measures should in principle be imposed for the duration of the restructuring plan:
  - (a) Beneficiaries must be required to refrain from acquiring shares in any company during the restructuring period, except where indispensable to ensure the long-term viability of the beneficiary. This aims at ensuring that the aid is used to restore viability and not to fund investments or to expand the beneficiary's presence in existing or new markets. Upon notification, any such acquisitions may be authorised by the Commission as part of the restructuring plan;
  - (b) Beneficiaries must be required to refrain from publicising State support as a competitive advantage when marketing their products and services.
88. Under exceptional circumstances, it may be necessary to require beneficiaries to refrain from engaging in commercial behaviour aimed at a rapid expansion of their market share relating to specific products or geographic markets by offering terms (for example as regards prices and other commercial conditions) which cannot be matched by competitors which are not in receipt of State aid. Such restrictions will only be applied where no other remedy, structural or behavioural, can adequately address the competition distortions identified, and where such a measure will not itself restrict competition in the market concerned. For the purposes of applying such a requirement, the Commission will compare the terms offered by the beneficiary with those offered by credible competitors with a substantial market share.

#### *Market opening measures*

89. In its overall assessment, the Commission will consider possible commitments from the Member State concerning the adoption of measures, either by the Member State itself or by the beneficiary, that are aimed at promoting more open, sound and



competitive markets, for instance by favouring entry and exit. This could in particular include measures to open up certain markets directly or indirectly linked to the beneficiary's activities to other EU operators, in compliance with EU law. Such initiatives may replace other competition measures that would normally be required of the beneficiary.

### 3.6.2.2. Calibration of competition measures

90. Measures to limit distortions of competition should address both moral hazard concerns and possible distortions in the markets where the beneficiary operates. The extent of such measures will depend on three criteria: first, the amount and nature of the aid and the conditions and circumstances under which it was granted; second, the size<sup>41</sup> and the relative importance of the beneficiary in the market and the characteristics of the market concerned; and third, the extent to which moral hazard concerns remain following the application of burden-sharing measures.
91. As regards the first criterion, the amount of State aid will be assessed both in absolute terms and in relation to the beneficiary's assets and the size of the market as a whole. With regard to the nature of the aid, the Commission will consider, *inter alia*, whether the aid bears adequate *ex ante* remuneration.
92. For the purposes of point 91, remuneration for restructuring aid in the form of loans and guarantees will be considered adequate if it complies with the requirements for the remuneration of rescue aid set out in point 60. Remuneration for aid in the form of capital injections will be considered adequate if the capital is subscribed at a sufficiently large discount to the quoted market price (or the estimated equivalent for non-quoted companies)<sup>42</sup> immediately prior to the announcement of the capital injection, in line with market practice. Unless the Member State concerned demonstrates otherwise, the Commission will presume that no remuneration applies to aid in the form of grants and will accordingly require a greater degree of competition measures where grants are used.
93. As regards the second criterion, the Commission will examine the size and the relative importance of the beneficiary on its market or markets both before and after the restructuring, to assess the likely effects of the aid on those markets as compared to the likely outcome in the absence of State aid. The measures will be tailored to market characteristics<sup>43</sup> to make sure that effective competition is preserved.
94. In relation to the third criterion, the Commission will assess whether the degree of burden sharing is in accordance with the requirements of section 3.5.2. Any divergence from those requirements will be taken into account for the purposes of determining the appropriate level of measures to limit distortions of competition.

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<sup>41</sup> In this respect the Commission may also take into account whether the beneficiary is a medium-sized or a large enterprise.

<sup>42</sup> Where the capital injection takes place through a rights issue, this price should be adjusted to take account of the effect of the rights issue.

<sup>43</sup> In particular, concentration levels, capacity constraints, the level of profitability and barriers to entry and to expansion may be taken into account.

95. Since restructuring activities may threaten to undermine the internal market, competition measures that help to ensure that national markets remain open and contestable will be considered positively.
96. Measures limiting distortions of competition should not compromise the prospects of the beneficiary's return to viability, which might be the case if a measure is very costly to execute or, in exceptional cases duly substantiated by the Member State concerned, would reduce the activity of the beneficiary to such an extent that its return to viability would be compromised, nor should they come at the expense of consumers and competition.
97. Aid to cover the social costs of restructuring of the type described in points 33 to 36 must be clearly identified in the restructuring plan, since aid for social measures exclusively for the benefit of redundant employees will be disregarded for the purposes of determining the extent of competition measures. In the common interest the Commission will ensure, in the context of the restructuring plan, that the social effects of the restructuring in Member States other than the one granting aid are kept to the minimum.
98. Measures limiting distortions of competition are likely to have a disproportionate impact on small enterprises, particularly given the burden of carrying out such measures and the difficulty of identifying parts of the business that can be divested without compromising viability. Such measures will therefore not normally apply to small enterprises, except where otherwise provided by rules on State aid in a particular sector. However, small enterprises should not normally increase their capacity during a restructuring.

### 3.6.3. *Recipients of previous unlawful aid*

99. Where unlawful aid has previously been granted to the undertaking in difficulty, in respect of which the Commission has adopted a negative decision with a recovery order, and where no such recovery has taken place in compliance with Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999<sup>44</sup>, the assessment of any rescue aid, restructuring aid or temporary restructuring support to be granted to the same undertaking shall take into account, first, the cumulative effect of the old aid and of the new aid and, secondly, the fact that the old aid has not been repaid<sup>45</sup>.

### 3.6.4. *Specific conditions attached to approval of aid*

100. The Commission may impose any conditions and obligations it considers necessary to ensure that the aid does not distort competition to an extent contrary to the common interest, in the event that the Member State concerned has not given a commitment that it will adopt such provisions. For example, it may require the Member State to take certain measures itself, to impose certain obligations on the beneficiary or to refrain from granting other types of aid to the beneficiary during the restructuring period.

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<sup>44</sup> Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1) with subsequent amendments.

<sup>45</sup> Case C-355/95 P, *Textilwerke Deggendorf v Commission and others* [1997] ECR I-2549.

### 3.7. Transparency

101. Member States must publish on a central website, or on a single website retrieving information from several websites (for example, regional websites), at least the following information on notified State aid schemes: the full text of the notified aid scheme and its implementing provisions, the granting authority, the names of the individual beneficiaries, the form (in particular the aid instrument) and amount of aid granted to each beneficiary, the region (at NUTS level II) in which the beneficiary is located and the principal economic sector in which the beneficiary has its activities, at NACE group level. These requirements also apply *mutatis mutandis* to ad hoc aid. Such information must be published after the granting decision has been taken, must be kept for at least 10 years and must be available to the general public without restrictions<sup>46</sup>.

## 4. RESTRUCTURING AID IN ASSISTED AREAS

102. Economic and social cohesion being a priority objective of the European Union under Article 174 of the Treaty and other policies being required to contribute to this objective under Article 175<sup>47</sup>, the Commission must take the needs of regional development into account when assessing restructuring aid in assisted areas. The fact that an ailing undertaking is located in an assisted area does not, however, justify a permissive approach to aid for restructuring: in the medium to long term it does not help a region to prop up companies artificially. Furthermore, in order to promote regional development it is in the region's own best interests to apply its resources in such a way as to rapidly develop activities that are viable and sustainable. Finally, distortions of competition must be minimised even in the case of aid to undertakings in assisted areas. In this context, regard must also be had to possible harmful spill-over effects which could take place in the area concerned and other assisted areas.
103. Thus, the criteria listed in chapter 3 are equally applicable to assisted areas, even when the needs of regional development are considered. In assisted areas, however, and unless otherwise stipulated in rules on State aid in a particular sector, the Commission will apply the provisions of section 3.6.2 on measures to limit distortions of competition in such a way as to limit the negative systemic impacts for the region. That could, in particular, involve less stringent requirements in terms of reductions of capacity or market presence. A distinction will be drawn in such cases between areas eligible for regional aid under Article 107(3)(a) of the Treaty and those eligible under Article 107(3)(c), to take account of the greater severity of the regional problems in the former areas. Where the specific circumstances of assisted areas so require, for example where a beneficiary faces particular difficulties in raising new market financing as a result of its location in an assisted area, the Commission may accept a contribution which is [lower than the aid amount for the purposes of point 65] [less than 50% of the restructuring costs for the purposes of point 67].

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<sup>46</sup> This information should be regularly updated (for example every six months) and should be available in non-proprietary formats.

<sup>47</sup> Article 175 of the Treaty provides, *inter alia*, that 'the formulation and implementation of the Union's policies and actions and the implementation of the internal market shall take into account the objectives set out in Article 174 and shall contribute to their achievement'.

## 5. AID TO SGEI PROVIDERS IN DIFFICULTY

104. In assessing State aid to SGEI providers in difficulty, the Commission will take account of the specific nature of SGEI and, in particular, of the need to ensure continuity of service provision in accordance with Article 106(2) of the Treaty.
105. SGEI providers may require State aid in order to continue to provide SGEI on terms that are compatible with their long-term viability. For the purposes of point 49, therefore, the restoration of long-term viability may be based on the assumption, in particular, that any State aid that meets the compatibility requirements of the European Union framework for State aid in the form of public service compensation<sup>48</sup> ('SGEI Framework'), the Commission Decision on the application of Article 106(2) of the Treaty to State aid in the form of public service compensation<sup>49</sup> ('SGEI Decision') or Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road<sup>50</sup> or Regulation (EC) No 1008/2008<sup>51</sup> and the Aviation Guidelines<sup>52</sup> or Council Regulation (EEC) No 3577/92<sup>53</sup> and the Maritime Guidelines<sup>54</sup> will continue to be available for the duration of any entrustment entered into before or during the restructuring period.
106. [IF OPTION 1 IS CHOSEN IN RELATION TO BURDEN SHARING: Where the Commission assesses aid to SGEI providers in difficulty under these guidelines, it will take into account all State aid received by the provider in question, including any compensation for public service obligations. However, since SGEI providers can derive a large proportion of their normal revenues from public service compensation, the total amount of aid determined in this manner may be very large in comparison with the size of the beneficiary and may overstate the burden on the State in relation to the beneficiary's restructuring. When determining the burden sharing required under section 3.5.2, therefore, the Commission will disregard any public service compensation that meets the compatibility requirements of the SGEI Framework, the SGEI Decision or Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road or Regulation (EC) No 1008/2008 and the Aviation Guidelines or Council Regulation (EEC) No 3577/92 and the Maritime Guidelines.]

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<sup>48</sup> Communication from the Commission — European Union framework for State aid in the form of public service compensation (2011), OJ C 8, 11.1.2012, p. 15.

<sup>49</sup> Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.1.2012, p. 3.

<sup>50</sup> Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ L 315, 3.12.2007, p. 1.

<sup>51</sup> Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, OJ L 293, 31.10.2008, p. 3–20., articles 16 to 18.

<sup>52</sup> Communication from the Commission Community Guidelines on financing of airports and start-up aid to airlines departing from regional airports, OJ C 312 f 9.12.2005, p. 1-14,.

<sup>53</sup> Council regulation (EEC) No 3577/92 of 7 December applying the principles of freedom to provide services to maritime transport within Member States, OJ L 364 of 12.12.1992, p. 7-10.

<sup>54</sup> Commission communication C(2004)43 — Community guidelines on State aid to maritime transport, OJ C 13 of 17.1.2004, p. 3-12.

107. To the extent that assets are necessary for the provision of SGEI, it may not be practicable to require the divestment of such assets by way of measures to limit distortions of competition for the purposes of section 3.6.2. In such cases, the Commission may require alternative measures to be taken to ensure that competition is not distorted to an extent contrary to the common interest, in particular by introducing fair competition in respect of the SGEI in question as soon as possible.
108. Where an SGEI provider is not able to comply with the conditions of these guidelines, the aid in question cannot be found compatible. In such cases, however, the Commission may authorise the payment of such aid as is necessary to ensure continuity of the SGEI. The Commission will only authorise aid where the Member State concerned demonstrates on objective grounds that the aid is strictly limited to the amount and duration indispensable to entrust a new provider with the service.

## **6. AID SCHEMES FOR SMALLER AID AMOUNTS AND BENEFICIARIES**

### **6.1. General conditions**

109. The Commission may authorise schemes for providing limited amounts of rescue aid, restructuring aid or temporary restructuring support to SMEs or smaller State-owned undertakings<sup>55</sup>. Subject to the following specific provisions, the compatibility of such schemes will be assessed in the light of the conditions set out in chapter 3. Any aid which is granted under a scheme but does not meet those conditions in full must be notified individually and approved in advance by the Commission.
110. Schemes must specify the maximum amount of aid that can be awarded to any one undertaking as part of an operation to provide rescue aid, restructuring aid or temporary restructuring support, including where the plan is modified. Any aid exceeding that amount must be notified individually to the Commission. The maximum total amount of aid granted to any one undertaking may not be more than EUR 5 million, including any aid obtained from other sources or under other schemes.
111. Unless otherwise stipulated in rules on State aid in a particular sector, awards of aid under schemes authorised from the date of application of these guidelines will be exempted from individual notification only where the undertaking concerned meets at least one of the criteria set out in point 21. Aid to undertakings that do not meet any of those criteria must be notified individually to the Commission so that it can assess whether they qualify as undertakings in difficulty.
112. Member States must also notify measures individually to the Commission where one undertaking takes over assets of another undertaking which has itself already received rescue aid, restructuring aid or temporary restructuring support.

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<sup>55</sup> For the purposes of these guidelines, ‘smaller State-owned undertakings’ are undertakings that would qualify as small or medium-sized enterprises under Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36) but for the fact that 25% or more of the capital or voting rights are directly or indirectly controlled, jointly or individually, by one or more public bodies.

113. The Commission may require Member States to limit the duration of certain schemes (normally to four years or less) and to conduct an evaluation of those schemes.
114. Evaluations will be required for schemes where the potential distortions are particularly high, that is to say schemes where there is a risk of significant restrictions of competition if their implementation is not reviewed in due time.
115. Given the objectives and in order not to impose disproportionate burdens on Member States in respect of smaller aid projects, this only applies to aid schemes with large budgets or containing novel characteristics, or when significant market, technology or regulatory changes are anticipated. The evaluation must be carried out by an expert independent from the State aid granting authority, on the basis of a common methodology<sup>56</sup>, and must be made public. The evaluation must be submitted to the Commission in due time to allow for the assessment of the possible extension of the aid scheme and in any case upon expiry of the scheme. The precise scope of the evaluation and how it is to be carried out will be defined in the decision approving the aid measure. Any subsequent aid measure with a similar objective must take into account the results of the evaluation.

## **6.2. Conditions for approval of rescue aid schemes**

116. Rescue aid schemes must satisfy the conditions set out in chapter 3. The condition set out in point 57(d) will be deemed to have been satisfied provided that rescue aid is granted for no longer than six months, during which time an analysis must be made of the beneficiary's position. Before the end of that period, the Member State must either approve a restructuring plan or liquidation plan or demand reimbursement of the loan and the aid corresponding to the risk premium from the beneficiary.

## **6.3. Conditions for approval of restructuring aid schemes**

117. The Commission will authorise restructuring aid schemes only if the grant of aid is conditional on meeting the conditions set out in chapter 3 and, in particular, on full implementation by the recipient of a restructuring plan that complies with those conditions and has been approved by the Member State concerned. [IF OPTION 1 IS CHOSEN IN RELATION TO BURDEN SHARING: For the purposes of assessing compliance with the requirements set out in point 65, contributions to the restructuring will be considered to be adequate if their amount is at least as high as the nominal amount of the aid.]

## **6.4. Conditions for approval of temporary restructuring support schemes for SMEs**

118. Temporary restructuring support schemes must satisfy the conditions set out in chapter 3.

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<sup>56</sup> Such a common methodology may be provided by the Commission.

## **7. PROCEDURES**

### **7.1. Accelerated procedure for rescue aid**

119. The Commission will as far as possible endeavour to take a decision within a period of one month in respect of rescue aid that complies with all of the conditions set out in chapter 3 and with the following cumulative requirements:

- (a) the undertaking concerned satisfies at least one of the criteria set out in point 21;
- (b) the rescue aid is limited to the amount resulting from the formula set out in Annex 1 and does not exceed EUR 10 million;
- (c) the aid is not granted in the situations mentioned in point 75(b) or (c).

### **7.2. Accelerated procedure for temporary restructuring support for SMEs**

120. The Commission will as far as possible endeavour to take a decision within a period of one month in respect of temporary restructuring support that complies with all of the conditions set out in chapter 3 and with the following cumulative requirements:

- (a) the undertaking concerned satisfies at least one of the criteria set out in point 21;
- (b) the liquidity support is limited to [twice] [three times] the amount resulting from the formula set out in Annex 1 and does not exceed EUR 10 million;
- (c) the aid is not granted in the situations mentioned in point 75(b) or (c).

### **7.3. Procedures related to restructuring plans**

#### *7.3.1. Implementation of the restructuring plan*

121. The beneficiary must fully implement the restructuring plan and must discharge any other obligations laid down in the Commission decision authorising the aid. The Commission will regard any failure to implement the plan or to fulfil the other obligations as misuse of the aid, without prejudice to Article 23 of Regulation (EC) No 659/1999 or to the possibility of an action before the Court of Justice in accordance with the second subparagraph of Article 108(2) of the Treaty.

122. Where restructuring operations cover several years and involve substantial amounts of aid, the Commission may require payment of the restructuring aid to be split into instalments and may make payment of each instalment subject to:

- (a) confirmation, prior to each payment, of the satisfactory implementation of each stage in the restructuring plan, in accordance with the planned timetable; or
- (b) its approval, prior to each payment, after verification that the plan is being satisfactorily implemented.

### 7.3.2. *Amendment of the restructuring plan*

123. Where restructuring aid has been approved, the Member State concerned may, during the restructuring period, ask the Commission to agree to changes to the restructuring plan and the amount of the aid. The Commission may allow such changes where they meet the following conditions:
- (a) the revised plan must still show a return to viability within a reasonable time scale;
  - (b) if the amount of the aid is increased, the extent of burden sharing must also increase correspondingly and/or the competition measures must be more extensive than those initially imposed;
  - (c) if the proposed competition measures are smaller than those initially imposed, the amount of the aid must be correspondingly reduced;
  - (d) the new timetable for implementation of the competition measures may be delayed with respect to the timetable initially adopted only for reasons outside the beneficiary's or the Member State's control: if that is not the case, the amount of the aid must be correspondingly reduced.
124. If the conditions imposed by the Commission or the commitments given by the Member State are relaxed, the amount of aid must be correspondingly reduced or other conditions may be imposed.
125. Should the Member State introduce changes to an approved restructuring plan without duly informing the Commission, or should the beneficiary depart from the approved restructuring plan, the Commission will initiate proceedings under Article 108(2) of the Treaty, as provided for by Article 16 of Regulation (EC) No 659/1999 (misuse of aid), without prejudice to Article 23 of Regulation (EC) No 659/1999 and to the possibility of an action before the Court of Justice in accordance with the second subparagraph of Article 108(2) of the Treaty.

### 7.3.3. *Need to inform the Commission of any aid granted to the beneficiary during the restructuring period*

126. Where restructuring aid received by a large or medium-sized enterprise is examined under these guidelines, the grant of any other aid during the restructuring period, even in accordance with a scheme that has already been authorised, is liable to influence the Commission's assessment of the extent of the competition measures required.
127. Notifications of aid for restructuring a large or medium-sized enterprise must indicate all other aid of any kind which is planned to be granted to the beneficiary during the restructuring period, unless it is covered by the *de minimis* rule or by exemption regulations. The Commission shall take such aid into account when assessing the restructuring aid.
128. Any aid actually granted to a large or medium-sized enterprise during the restructuring period, including aid granted in accordance with an approved scheme,



must be notified individually to the Commission to the extent that the latter was not informed thereof at the time of its decision on the restructuring aid.

129. The Commission shall ensure that the grant of aid under approved schemes is not liable to circumvent the requirements of these guidelines.

## **8. REPORTING AND MONITORING**

130. In accordance with the requirements of Council Regulation (EC) No 659/1999 and [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]<sup>57</sup>, Member States must submit annual reports to the Commission. These annual reports will be published on the Commission's website.

131. When adopting a decision under these guidelines the Commission may impose additional reporting obligations regarding the aid granted in order to be able to check whether the decision approving the aid measure has been respected. In certain cases, the Commission may require the appointment of a monitoring trustee, a divestment trustee or both, to ensure compliance with any conditions and obligations linked to the approval of the aid.

## **9. APPROPRIATE MEASURES AS REFERRED TO IN ARTICLE 108(1)**

132. The Commission will propose, by separate letter, pursuant to Article 108(1) of the Treaty, that the Member States adopt appropriate measures as set out in points 133 and 134, with regard to their existing aid schemes. The Commission will make authorisation of any future scheme conditional on compliance with those provisions.

133. Member States which have accepted the Commission's proposal must adapt their existing aid schemes which are to remain in operation after **Date1** within six months in order to bring them into line with these guidelines.

134. Member States must indicate their acceptance of these appropriate measures within one month following receipt of said letter proposing appropriate measures.

## **10. DATE OF APPLICATION AND DURATION**

135. The Commission will apply these guidelines with effect from **Date1** until **Date2**.

136. Notifications registered by the Commission prior to **Date1** will be examined in the light of the criteria in force at the time of notification.

137. The Commission will examine the compatibility with the internal market of any rescue or restructuring aid granted without its authorisation and therefore in breach of Article 108(3) of the Treaty on the basis of these guidelines if some or all of the aid is granted after their publication in the Official Journal of the European Union.

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<sup>57</sup> [OJ L 140, 30.4.2004, p. 1, with subsequent amendments.]

138. In all other cases it will conduct the examination on the basis of the guidelines which apply at the time the aid is granted.
139. Notwithstanding the provisions of points 136 to 138, the Commission will apply the provisions of chapter 5 from **Date1** when examining aid to SGEI providers in difficulty, regardless of when that aid was notified or granted.

**ANNEX 1 — Formula<sup>58</sup> for calculation of the maximum amount of rescue aid or temporary restructuring support per six-month period to qualify for the accelerated procedure**

$$\frac{EBIT_t + depreciation_t - (working\ capital_t - working\ capital_{t-1})}{2}$$

The formula is based on the operating results of the beneficiary (EBIT, earnings before interest and taxes) recorded in the year before granting/notifying the aid (indicated as t). To this amount depreciation has been added back. Then changes in working capital must be subtracted from the total. The change in working capital is calculated as the difference between the current assets and current liabilities<sup>59</sup> for the latest closed accounting periods. Similarly, any provisions at the level of the operating result will need to be clearly indicated and the result should not include such provisions.

The formula aims at estimating the negative operating cash flow of the beneficiary in the year preceding the application for the aid (or before award of the aid in the case of non-notified aid). Half of this amount should keep the beneficiary in business for a six-month period. Thus the result of the formula has to be divided by 2.

This formula can only be applied where the result is a negative amount. If it leads to a positive result, a detailed explanation will need to be submitted demonstrating that the beneficiary is an undertaking in difficulty as defined in points 21 and 22.

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<sup>58</sup> To EBIT must be added back depreciation in the same period plus the changes in working capital over a two-year period (year before the application and preceding year), divided by two to determine an amount over six months.

<sup>59</sup> Current assets: liquid funds, receivables (client and debtor accounts), other current assets and prepaid expenses, inventories. Current liabilities: financial debt, trade accounts payable (supplier and creditor accounts) and other current liabilities, deferred income, other accrued liabilities, tax liabilities.

Example:

Earnings before interest and taxes (EUR million)	(12)	
Depreciation (EUR million)	2	
Balance sheet (EUR million)	December 31, t	December 31, t-1
<i>Current assets</i>		
Cash or equivalents	10	5
Accounts receivable	30	20
Inventories	50	45
Prepaid expenses	20	10
Other current assets	20	20
Total current assets	130	100
<i>Current liabilities</i>		
Accounts payable	20	25
Accrued expenses	15	10
Deferred income	5	5
Total current liabilities	40	40
Working capital	90	60
Change in working capital	30	

$[-12 + 2 - 30] / 2 = -\text{EUR } 20 \text{ million.}$

As the outcome of the formula is higher than EUR 10 million, the accelerated procedure described in points 119 and 120 cannot be used. In addition, in this example, if the amount of rescue aid exceeds EUR 20 million or the amount of temporary restructuring support exceeds [EUR 40 million] [EUR 60 million], the Member State should provide an explanation of how the future cash-flow needs of the beneficiary and the amount of aid have been determined.

## **ANNEX 2 – Indicative model restructuring plan**

This Annex sets out an indicative table of contents for a restructuring plan, to assist Member States and the Commission in preparing and reviewing restructuring plans as efficiently as possible.

The information set out below is without prejudice to the more detailed requirements set out in the guidelines concerning the content of a restructuring plan and the other matters to be demonstrated by the Member State concerned.

1. Description of the beneficiary
2. Description of the market or markets where the beneficiary operates
3. Demonstration of the social hardship that the aid aims to prevent or the market failure that it aims to address, comparison with a credible alternative scenario not involving State aid, demonstrating how such objective or objectives would not be attained, or would be attained to a lesser degree, in the case of the alternative scenario
4. Description of the sources of the beneficiary's difficulties (including an assessment of the role of any flaws in the beneficiary's business model or corporate governance system in causing those difficulties and the extent to which the difficulties could have been avoided through appropriate and timely management action) and SWOT analysis
5. Description of possible plans to remedy the beneficiary's problems and comparison of those plans in terms of the amount of State aid required and the anticipated results of those plans
6. Description of the State intervention, full details of each State measure (including the form, amount and remuneration of each measure) and demonstration that the State aid instruments chosen are appropriate to the issues that they are intended to address
7. Outline of the process for implementing the preferred plan with a view to restoring the beneficiary's long-term viability within a reasonable timescale (in principle, not to exceed three years), including a timetable of actions and a calculation of the costs of each action
8. Business plan setting out financial projections for the next five years and demonstrating the return to long-term viability
9. Demonstration of the return to viability under both a baseline and a pessimistic scenario, presentation and justification on the basis of a market survey of the assumptions used and sensitivity analysis
10. Proposed burden-sharing measures
11. Proposed measures to limit distortions of competition