

COMMENTS ON THE EUROPEAN COMMISSION
CONSULTATION DOCUMENT
ON THE STATE AID ACTION PLAN:
A ROAD MAP FOR REFORM 2005 - 2009

These comments are submitted by the Competition Law Association and are a response to the Competition Commission Consultation Paper of June 2005 entitled "State Aid Action Plan - Less and better targeted state aid: a roadmap for state aid reform 2005 - 2009".

The Competition Law Association is the UK branch of the Ligue Internationale du Droit de la Concurrence. The membership of the Competition Law Association includes barristers, solicitors and in-house lawyers, academics and other professionals including economics, patent and trademark agents. The Competition Law Association's main object is to promote freedom of competition and combat unfair competition.

1. LESS AND BETTER TARGETED STATE AIDS

The central tenet of the Consultation Paper is that state aid should be better focused and targeted towards the Lisbon Strategy objectives of growth, jobs and competitiveness. EC Member States will need to clearly identify an objective of common interest and justify the need for aid, which must be proportionate and create the needed incentives.

Now that the modernised competition rules are in place, the Competition Law Association welcomes the European Commission addressing the EC state aid rules. The Association welcomes the fundamental nature of the Commission's review and notes that the Commission intends to review all of the laws and guidelines relating to state aid by 2009. The Association would point out that the UK grants proportionately less state aid than most other EC Member States and, therefore, from the viewpoint of the competitiveness of the UK economy welcomes the fact that the Commission recognises that there should be less and better targeted state aid.

However, we would also point out that the reform road map raises challenges for the Commission to balance the key objective of "less and better targeted state aid" against the competitiveness of the EU economy as a whole in the global economy. Obviously the Commission will need to consider the economic position of the EU vis-à-vis countries such as China and India (which routinely provide state assistance to companies) and ensure that, at the same time as trying to create a level competitive playing field within the EU, the EU as a whole is not then put at a competitive disadvantage vis-à-vis other major and emerging economies in the world. Indeed, it may cause a damaging trade row if the EU were forced to raise tariffs on a variety of products due to the fact that state assistance were no longer being used in relevant product markets.

The above comments notwithstanding, broadly we welcome each of the central elements of the Commission's reform package, which would appear to be:

- less and better targeted state aid across the EU;
- a more robust economic approach, including an assessment of the appropriateness and proportionality of the aid granted;
- better focus of the Commission's resources on enforcing rules in cases where state aid is most likely to affect trade between Member States; and
- greater recognition of the shared responsibility of the Commission and Member States in this field.

2. REGIONAL AID AND REGENERATION

The Consultation Paper makes it clear at paragraphs 39 - 44 that the Commission considers that cohesion in particular is an important element of the Lisbon Strategy - the Commission considers that reducing disparities between the regions of Europe is a factor of stability and maximising growth potential. The Commission considers that state aid policy can contribute to cohesion, by preventing a damaging subsidy race between regions, and by creating the right incentives for growth and jobs, in the least developed regions and elsewhere.

The Competition Law Association welcomes the fact that the Consultation Paper states that the current regional aid guidelines will be reviewed. We recognise that the regional aid guidelines were adopted as far back as 1998 and note that the revisions will take into account three wider EU objectives of convergence, regional competitiveness and employment and European territorial co-operation.

State aid is often vital to regeneration projects in deprived regions, particularly at the beginning. However, as the Commission is keen to see the amount of state aid given to industry minimised, there is a danger that state aid for regeneration could inadvertently breach the new state aid rules. The Consultation Paper does not discuss regional aid or regeneration and does not expand on how it sees the regional aid guidelines being reviewed or whether there will be new special rules relating to regeneration in deprived areas. The Association would appreciate more detail on the Commission's plans in the following areas:

- the Commission's plans for urban regeneration and rural development aid; and
- whether the Commission intends specific provisions for regeneration in areas which are not classified as deprived.

We note that the UK, as well as France, Austria and Germany, have indicated that they are concerned that lower regional state aid in their countries will lead to job losses and force firms to relocate elsewhere in the EU. Their main concern is the Commission's plan to stop comparatively wealthy countries subsidising large firms in poor regions in their countries. We would urge the Commission to take account of and address these fears re lower regional state aid in wealthier EC Member States and the danger of firms relocating to other EC Member States or, indeed, outside the EU.

Nevertheless, on the whole, we do agree that it is sensible to reform the state aids regime by steering EC Member States away from subsidising ailing national giants and towards assisting dynamic, smaller firms. On balance, it is clear that a region classified as poor before EU enlargement may not seem so deprived when compared to the average of the EU of 25 Member States. We agree that the correct way forward is the principle of less aid, which is better targeted, and that aid should move away from supporting chronically loss-making companies which are, in fact, often simply delaying urgently needed structural reform.

3. DE MINIMIS AID

At paragraph 38 of the Consultation Paper the Commission states that the de minimis thresholds for state aid will be raised.

The Competition Law Association would wholly welcome a raising of the de minimis thresholds and the consequent reduction in notifications that would be required under the state aid rules.

At present the European Commission considers that public funding to a single recipient of up to Euros 100,000 (approximately £70,000) over a rolling three year period has a negligible impact on trade and competition and does not require notification. We consider that this de minimis threshold needs to be very substantially raised. Since enlargement, a more targeted approach to state aid is clearly necessary. As with modernisation of competition law, we hope that the Commission will use its finite resources to concentrate on serious state aid cases rather than on minor ones where the value of financial assistance provided through state resources is low.

The Commission recognised in its recent draft communication on "Lesser Amounts of State Aid" (LASA) that some kinds of aid, while exceeding the de minimis ceilings, are too modest in size to represent a significant threat to competition within the EU. The draft communication states that size matters in assessing state aids and introduces a new category of state aid (LASA) that exceed the de minimis ceilings, but which can, subject to certain safeguards, still be regarded as too modest in size to represent a significant threat to competition (and trade) between EC Member States. According to the latest draft, the total amount of LASA that an undertaking can receive will be limited to Euros 1 million over a three year period. We welcome this draft communication and change of approach although, again, we would suggest that the LASA ceilings should be raised.

4. LESS NOTIFICATIONS

The Commission has previously issued a number of block exemptions in relation to training, SMEs and employment. At paragraphs 35 - 37 of the Consultation Paper the Commission states that it intends to simplify and consolidate the existing block exemptions into a single general block exemption and integrate a broader range of exemptions, notably as regards aid to support SMEs and employment. Aid falling within the new general block exemption will not need to be notified.

We welcome the idea of a single broader general state aids block exemption. At present far too many innocuous grants of financial support assisting with laudable objectives consistent with the policies of the EU need to be notified to the Commission on a "fail safe" basis. Completing a state aids notification is very time consuming and expensive and a large amount of information is required.

Via the proposed single state aids block exemption and intended revised guidelines in other key areas, the Commission is effectively proposing to facilitate approval of state aid measures that are unlikely to produce major distortions of competition and which would contribute directly to the achievement of Community objectives, such as the promotion of research and development, protection of the environment, creation of new and better employment, promotion of training, the development of SMEs and regional development. We welcome these proposed measures as this should allow EC Member States greater flexibility to design and implement aid measures which are adapted to local conditions and enable the Commission to transfer resources from the assessment of relatively minor cases towards more important cases which may produce major distortions of competition.

Receiving fewer notifications should help the Commission to better prioritise its case load and assist with the Commission's main aim in relation to state aid policy of maintaining a level competitive playing field for all undertakings in the EU and the most economical use of limited state resources.

5. INVOLVEMENT OF RECIPIENTS IN THE STATE AID PROCESS

At paragraphs 48 - 56 of the Consultation Paper the Commission discusses how it wants to improve its practices and procedures so that it increases efficiency, effective enforcement and monitoring. The Commission states that it will try to instil more predictable timeline and ensure higher transparency by providing more information on the Internet.

The Commission also intends to examine whether independent authorities in EC Member States could play a role in state aid enforcement (detection and provisional recovery of illegal aid and execution of recovery decisions). The Commission is also

considering establishing a network of state aid authorities or contact points in order to facilitate the flow of information and the exchange of best practice. Finally, the Commission states that it will step up the monitoring of the compliance by Member States of conditions laid down in state aid decisions, including the respect of the provisions of the block exemption regulations.

Increased efficiency and effective enforcement and monitoring are important aims and we welcome the Commission's proposals in this area. We also strongly advocate increased transparency in relation to the control of state aids and strengthened third party involvement in order to make state aid control more transparent and effective.

Crucially, though, we think that the Commission has omitted the main area where we would wish to see a change to its practices and procedures (and, indeed, a change to the substantive laws relating to state aid) - that area is the rights of the recipient of aid.

State aids must be notified to the Commission and authorised in advance (that is, they may not be implemented until the Commission has issued a clearance decision). If aid is unlawfully paid through state resources, then the EU Member State is required to recover the unlawfully paid state aid plus interest from the recipient. If a state body were to misjudge a state aid issue and to unlawfully give aid to a recipient, though, the state body itself does not face any financial risk; the recipient would have to repay any unlawful aid plus interest. It is also only the grantor of the financial assistance (the state body) that has the power and the duty to notify the financial assistance; the recipient does not presently have rights in relation to the notification process. We think that these aspects of the state aid rules are potentially unfair to recipients and would press the Commission to consider this issue further.

It is arguable that present policy in relation to the recipient of aid would appear to be:

- to make it disadvantageous for enterprises to receive unlawfully granted state aid (and disadvantageous for financial institutions to lend money on the strength of state guarantees that give rise to unlawful state aid to the borrower) rather than to make it disadvantageous for EC Member States unlawfully to grant the aid; yet, at the same time
- to rely on a procedural fiction that administrative procedure conducted by the Commission is a procedure between the Commission and the EC Member State in question, to which the recipient of the potentially unlawful aid is merely a third party, with less rights than those enjoyed by a complainant.

As has been made clear by Sir Jeremy Lever QC in his article "The State Aid Regime: The Need for Reform"¹ the state aids regime needs reforming so that Member States are no longer favoured both procedurally and substantially.

Under the present state aids system, the state is placed in a win-win situation. As Sir Jeremy points out "If the unlawful aid is not detected, the grantor state simply achieves the object that led it to grant the aid, albeit at a pre-determined cost to the state. If, alternatively, the unlawful grant is detected, the state gets back the aid, with interest at a commercial rate. In many such cases, the state also gets much, and sometimes all, of the benefit of activity that has been undertaken as a condition for the grant of the aid." We would suggest that the

¹ This article is contained in the book "The Law of State Aid in the European Union" (2003) edited by Biondi, Eeckhout and Flynn.

EC Member State, as well as the recipient, should be ordered to pay some form of penalty to the EU where it unlawfully grants state aid.

It is also clear from current case-law and EC Regulation 659/1999 that the state aid notification procedure generally is considered to be between the Commission and the EC Member State only and that the proposed recipient of financial assistance is merely a third party with a strictly limited right to submit observations in certain prescribed periods in the procedure. We would recommend that the recipient of financial assistance through state resources should be given extensive rights in the administrative procedure, including possibly the right to notify the assistance itself to the European Commission.

6. SPECIAL SECTORS

Although the principles set out in the Action Plan are described as applying to all sectors, there will continue to be special rules in the agriculture, fisheries, coal and transport sectors. The Action Plan does not address reform of these rules.

We think that it is imperative that the special sector rules are also reformed. The Competition Law Association considers that the rules applicable to state aids in the special sectors are complicated and inaccessible. Relevant government departments also seem to find the rules to be excessively complicated and find it very difficult to provide meaningful guidance on the way in which the rules should be interpreted. Unless the Commission can provide compelling evidence that there remains a clear need for special sector rules, we would suggest that the special state aid rules should be abolished. Indeed, we note that the Commission has announced in a draft communication last year that it intends to extend the de minimis rules to special sectors, such as transport. We welcome this trend and the clear implication from the Commission that there is nothing inherent relating to the special sectors that should lead to their special treatment in terms of financial assistance and state aids.

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The Competition Law Association appreciates the opportunity to comment on the European Commission consultation document on the State Aid Action Plan. If the Commission would find it helpful to discuss any of the above comments, we should be happy to do so and request that you contact Geraldine Tickle of Martineau Johnson, No 1 Colmore Square, Birmingham B4 6AA telephone 44(0)870 763 1529; email: geraldine.tickle@martjohn.com in the first instance.

Competition Law Association
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