

The European Commission's State aid action plan

Response of the Law Society of England and Wales' EU Committee

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The Law Society



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Response of the Law Society of England and Wales' EU Committee to the European Commission's State aid action plan ("SAAP")

1. The Law Society of England and Wales ("the Society") is responsible for the representation and regulation of approximately 120,000 solicitors in England and Wales. The Law Society regularly comments on domestic UK legislation as well as EU legislative initiatives, through its Brussels Office. The Law Society's comments are aimed at ensuring that access to justice is guaranteed, and that laws are clear, workable and fair.
2. This response has been drafted by the Society's EU Committee. The Committee comprises fifteen practitioners with expertise in various fields of EU law. In drafting its response, the Society has consulted with members of the Joint Working Party of the Bars and Law Societies of the UK on Competition Law¹ as well as with Solicitors in Local Government².

General comments

3. The Society welcomes the opportunity to comment on the Commission's policy priorities in the field of State aid and in general, we welcome the overall approach outlined in the SAAP. The majority of our comments will be in relation to section III of the SAAP, on practice and procedure, but we would like to make some initial general comments.
4. The Society recognises the general shift in emphasis that the Commission has outlined in its SAAP. We support the Commission's intention to improve the level of economic analysis used in the application of the State aid rules consistent with the general shift in competition policy. It is important, however, that clear and transparent legal expression is given to any economic principles elaborated by the Commission and included in legislation or guidelines. It is imperative that any change in approach leads to an improvement and not a diminution in the degree of legal certainty provided by the rules. We also believe that it would be very useful if the Commission could issue guidance to define some of the component parts of the definition of State aid, such as the concept of "tradeable in the EU".

Simplification and consolidation

5. We would like to welcome efforts by the Commission to implement the Commission's better regulation agenda in this field. Simplification is an overarching principle of better regulation and a principle that we support. The measures proposed by the Commission, such as extension of the block exemptions and an increase in the *de minimis* limits, should help to simplify the system of State aid and provide a better focus for other State aid assessment and enforcement activities.

¹ The members of the Joint Working Party of the Bars and Law Societies of the UK on Competition Law comprise barristers, advocates and solicitors from all three United Kingdom jurisdictions; the membership includes both those in private practice and in-house. Members of the Working Party have experience of acting for complainants, defendant companies and regulators on a variety of Competition issues.

² Solicitors in Local Government Limited is a professional association which represents the 4,000 local government solicitors and trainees in England and Wales and is a group recognised by the Law Society.

6. Equally however, we are of the view that before revising legislation or re-legislating (whether or not with a view to consolidation), the scope and effectiveness of existing legislation should be reviewed. Perceived problems may arise not from poor legislation (or not exclusively from poor legislation) but as a result of other sources, such as ignorance about the legislation, poor or partial implementation of that legislation, inadequate resources or poor administrative practice at the national or EU level. We therefore urge the Commission to undertake an open review of the situation rather than treat it simply as an opportunity to re-legislate.
7. Where there is new legislation, we would expect that it comply with the basic requirements of legislative drafting including the following: where new legislation or guidance is adopted we would expect that it would take into account case law and recommendations for change; new provisions should be carefully dovetailed with existing provisions; and legislation or specific provisions which have been overtaken by subsequent changes or which were never implemented, should be repealed. We would therefore support effective consolidation of existing law and practice, and the replacement and repeal of redundant legislation.
8. We would also ask the Commission to keep any new block exemptions under constant *ex post* review in order to assess whether the objectives of simplification and consolidation are being met. The Commission should state its willingness to revisit these measures if they are failing to meet their objective(s).
9. In drafting new measures, it would also be helpful if the Commission considered its draft rules or guidance with respect to a range of examples of aid that could be granted by a range of bodies, for instance central Government departments, district [municipal] councils and other bodies such as housing associations and regeneration partnerships. Following through the envisaged processes in relation to practical examples would help to check the practicality of proposed rules. Such examples could be used as part of targeted consultations which would help educate the different areas of 'government' as to the potential impact of 'giving' funds or help in kind without competition. Such exercises may also help to give the Commission a better idea of the different issues surrounding enforcement that exist in relation to different types of aid and areas requiring further examination.
10. From a practical point of view, exercises such as the production of the State aid *vade mecum* have proved very useful to practitioners, particularly those who are less familiar with this area. The production of unofficial consolidated texts, while less desirable than legislative consolidation, can also be of practical use and we would ask the Commission to make such texts publicly available in the interim before official consolidations are produced.

Practice and procedure

Transparency

11. We welcome suggestions by the Commission to improve in general terms the transparency of proceedings and of rules and practices, both at the EU and the domestic level. The transparency of proceedings is something that is of real concern at the moment, particularly in terms of State aid decisions taken within Member States.

12. Greater transparency through use of the internet is also to be welcomed when this relates to general information and procedures. In this light, we would encourage the Commission, and DG Competition in particular, to improve its own web-site in terms of clarity, ease of navigation, effectiveness of the search engine and so on. For those unaccustomed with the web-site, it can often prove very difficult to search for, and find information. Considerable improvements have already been made to the ease of use of the "COMP" web-site particularly with respect to the Anti-trust and Merger web-pages. However, the State aid web-pages (especially case law) remain particularly difficult to navigate.
13. We are also concerned about the availability of information in all languages. The availability of certain types of information does have an impact on access to justice for government bodies, companies and individuals i.e. their ability to challenge proceedings and decisions that affect them. We do appreciate the resource implications for the Commission involved in translation. We wonder whether national authorities (even the independent authorities mooted in the SAAP) could play a more active role in translating and disseminating information on rules and individual proceedings.

National State aid authorities

14. As for the suggestion in the paper that independent authorities could assist the Commission in State aid enforcement, we would appreciate further clarification as to what is envisaged. The Society supports in principle improvements and enhancement of the role of national State aid authorities in relation to notification and enforcement of State aid policy.
15. In particular, we consider that the vetting of notifications by a centralised national State aid authority can play a useful role in improving the quality of notification and accelerating the speed and effectiveness of obtaining clearance or authorisation and of identifying difficult issues at an early stage. We point to the role of the UK's Office of Government Commerce, as a helpful example.
16. We would also regard positively a forum for State aid matters similar to the European Competition Network (comprised for instance of the centralised notification authorities described above) on the assumption that its purpose was to facilitate the exchange of information on best practice and on individual cases dealt with at national and EU level.
17. The involvement of National Authorities in enforcement is obviously a more complex and controversial one. Clearly there would be difficult issues to resolve concerning conflicts of interest and adequate independence, particularly if the role envisaged involved the national authorities taking enforcement actions of its own rather than simply carrying out recovery measures as determined by the Commission and/or the European Court of Justice.
18. There would obviously need to be a clear separation at the Member State level between those bodies that deal with enforcement issues (recovery etc.) and those involved with the granting or management of State aid in the Member States. It is not clear how this would be achieved
19. It appears unlikely that Article 88 or other provisions of the Treaty would provide an adequate legal basis for Community legislation that required Member States to create such independent bodies.

20. Alternatively, the creation of independent enforcement bodies could be achieved through the initiative of the national Governments. From the perspective of the UK, one could for example envisage the Office of Fair Trading being given such a role. We are, at this point, somewhat sceptical about how effective this route might be. It may be a disincentive to national Governments to adopt such a route if there was inconsistency of commitment from other Member States to do likewise or an inconsistency in the level of commitment to enforcement carried out in practice.

National court, judges and private litigation

21. The SAAP also discusses the role of national judges and the use of private litigation in the enforcement of State aid. We agree that private action has an important role to play in the enforcement of State aid rules but that obstacles to this exist. For example, the courts have confirmed in the UK that competitors do not have the right to recover damages from recipients of unlawful State aid but only from the offending State authority³.
22. Complainants can only pursue action against the State in question in *that* State's domestic courts. This is something that presents additional barriers for foreign operators. While a Treaty amendment would be necessary before competitors could seek damages against Member States before the ECJ, the Commission could examine ways to allow competitors established in one Member State to sue the public authority of another Member State in his domestic courts.
23. We agree that it is important for both the Commission and all grantors of aid to ensure that both beneficiaries and other third parties are aware of their legal rights. We appreciate efforts to encourage the provision of such information but would also encourage the Commission to examine ways in which to strengthen such rights and increase the incentives for private litigation⁴. We note with interest the effects produced by the Remedies Directive in the field of public procurement in increasing the amount of private litigation against public authorities. The Commission could extend its current work on studying private litigation in the field of Articles 81 and 82 (and the future Green Paper) to cover questions of State aid.
24. On the role of national judges, we would also appreciate a clarification of paragraph 56 in the SAAP. Judges could indeed play a greater role in controlling whether aid measures not notified to the Commission fulfil the conditions of any future general block exemption or *de minimis* rules. We are unclear about the Commission's intention in reviewing the Notice on cooperation between national courts and the Commission. If the intention is simply to clarify in the Notice that national courts should apply or "supervise" the application of the block exemption and the *de minimis* rule, we feel that would be useful. Presumably the suggestion to expand the scope of application of the Notice to other bodies refers to future national enforcement authorities. We would need further clarification of this proposal before being able to give comments.

³ *Betws Anthracite Ltd. v DSK Anthrazit Ibbemburen GmbH*, [2003] EWHC 2403 (Comm)

⁴ It could be implied from the ECJ's judgment in *Case C-354/90 Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v France*, that affected competitors should be able to sue the recipients of unlawful State aid.

Rights of third parties and beneficiaries

25. A number of issues discussed by the Commission in its SAAP may have an impact on the rights of third parties. It would appear that the general intention of the Commission is to increase the powers available for carrying out investigations and to propose more stringent rules on the recovery of aid. We do not object in principle to such developments, but we consider that any increase in enforcement powers should be balanced with increased rights for the beneficiaries of aid and other third parties concerning for example access to information and rules on due process.
26. For instance, before the Commission takes a final decision to reject a State aid complaint, the complainant should be given the opportunity to submit comments (such as is possible under Article 7 of Regulation 773/2004 in relation to proceedings under Articles 81 and 82) as complainants are often best placed to comment on the impact of the aid on competition in the marketplace. In addition, beneficiaries should be granted greater rights to request and receive information vis a vis both the Commission and the Member State granting the aid. Contrary to what the perception may be, potential beneficiaries of State aid are not always given adequate or full information by the Member State in question.
27. Another issue of concern is the timing of appeals against Commission decisions before the Court of First Instance. Parties participating in formal investigations will be notified of the Commission's decision. Those who have not participated in the investigation may only become aware of the decision at a later date (e.g. time of publication of the decision or through the press). The time within which they can appeal is determined by publication of the decision in the Official Journal, something that is fairly unpredictable.
28. As a result, it becomes very difficult to advise clients involved in a transaction whose success depends on the approval of State aid as to when the transaction can be closed, simply because of the uncertainty as to when appeals may be lodged. Indeed much greater certainty is also necessary to ensure that public funds are not wasted in abortive costs on projects that are ultimately deemed to involve unlawful State aid.
29. We would therefore urge the Commission to fix a strict deadline, not exceeding six months, for the publication of its decisions in the Official Journal. This would create a greater degree of predictability for all parties concerned with regard to the timing of any potential challenge by third parties who have not been notified of the decision in question.

Efficiency of procedures

30. In terms of the Commission's efforts to improve the efficiency of proceedings and also the fullness and quality of notifications, we would make the following proposals. Procedures in respect of the preliminary examination should be tightened. Stricter time limits and requirements on Member States to provide information should be put in place. We suggest for instance a rule which stipulates that where sufficient information is not provided by the Member State or if serious doubts are raised within a certain time frame (i.e. two months), the investigation will pass to the formal investigation procedure. We believe that

this may encourage Member States to ensure the fullness and quality of information supplied at an early stage of the notification.

31. On a second point, the current eighteen-month limit set in Article 7(6) of Regulation 659/1999 is too long. We believe that this could be shortened considerably to a period of between eight and twelve months. The shorter time limits set in the Merger Regulation may not, at the moment, be practicable but they could at least be used by the Commission as aspirational targets.

Consistency of Commission decision-making

32. A further issue which we consider to be of importance to the legal certainty and consistency of Commission State aid decisions relates to the internal organisation of the Commission itself and the way in which it deals with State aid cases. While we appreciate that specific State aid rules exist in relation to specific sectors, such as transport or agriculture, we are concerned about the effect upon the consistency of decision making in terms of policy, legal reasoning, economic analysis and procedure which arises as a result of decisions being made in a range of different directorate generals (i.e. Competition, Transport & Energy, Fisheries and Agriculture).
33. We would prefer a centralised State aid authority within the Commission and specifically, within the Directorate-General for Competition working in consultation with the other DGs concerned. This will help to ensure a greater degree of consistency in the Commission's State aid decisions. It would also mean that the sector DG's are not called on to take State aid decisions that relate to their "constituency", which gives greater rise to potential conflicts.

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