RESPONSE OF THE EU STATE AID LAW ASSOCIATION TO THE COMMISSION CONSULTATION ON THE NOTICE ON THE ENFORCEMENT OF STATE AID RULES BY NATIONAL COURTS

This response is submitted by the EU State Aid Law Association ("**ESALA**") in response to the consultation and draft Commission Notice on the enforcement of State aid rules by national courts (the "**Draft Notice**").

ESALA is a new forum of leading practitioners in State aid law from law firms across Europe, as well as scholars specializing in State aid law.

ESALA welcomes the opportunity to respond to the Consultation Paper. For further information on ESALA or in relation to this paper please contact Cees Dekker (cees.dekker@nysingh.nl), Massimo Merola (massimo.merola@belex.com) or Isabel Taylor (isabel.taylor@slaughterandmay.com)

Comments on the Draft Notice:

We have structured our comments below by reference to the relevant sections of the Draft Notice.

1. Introduction (section 1 of the Draft Notice)

1.1 This Notice appears to be intended to be broader in scope than the 2009 Commission notice on the enforcement of State aid law by national courts[1] (the "**2009 Notice**"), in that it is not solely focused on remedies, but aims to "[lay] down all the available tools of cooperation and to address the consequences in case of violation of State aid rules".[2] We agree that it will be helpful to have a notice that describes more fully the role of the national courts. In particular, we consider the elements of the Draft Notice that clarify the relationship and interaction between national courts and the Commission to be a useful addition to the notice.

1.2 However, overall, we do not see the Draft Notice as significantly broader in scope than the 2009 Notice. Although there has been a significant re-writing of the text, the changes are largely updating or clarifying the content of the 2009 Notice. In particular, the Draft Notice focuses almost exclusively on "private enforcement" (as defined in the Draft Notice) and has only limited guidance on the role of the courts in public enforcement. Whilst public enforcement is to some extent covered in the Commission Notice on the recovery of unlawful and incompatible State aid[3] (the "**Recovery Notice**"), further discussion on the role of national courts' in relation to: (i) actions brought by Member States to enforce a recovery order against individual beneficiaries; and (ii) actions brought by beneficiaries contesting actions for recovery by Member States might be helpful. The United Kingdom, for example, has seen recent litigation in connection with the recovery of aid following the Commission's decision in

[1] 2009/C 85/01.

[2] Draft Notice, paragraph 7.

[3] 2019/C 247/01.

relation to the UK Aggregates Levy.[4] It is clear that this is a key competence of national courts in addressing "the consequences in case of violation of State aid rules".[5]

1.3 For completeness, it may also be helpful to include, in the discussion of exemptions to the standstill obligation at paragraphs 15 to 17 of the Draft Notice, a reference to the possibility of "existing aid". This would be consistent with the approach taken in the 2009 Notice, and could then cross refer to the more detailed discussion that has been added to the Draft Notice at Section 4.2.2.2.

2. General Principles of the Enforcement of State Aid Rules (section 2 of the Draft Notice)

2.1 The Draft Notice appears to have substantially revised the commentary on standing compared to the 2009 Notice. We have some reservations as to whether this new and more detailed text will be more helpful to a national court as it does not seem that any new principles have been introduced. More specifically:

(i) It is not clear to us that the issues considered in paragraph 25 are really "further elements" in fiscal measures cases, so much as a more specific application of the principles explained in paragraph 24; paragraphs 73 to 75 of the 2009 Notice appeared to us to be a clearer explanation of the relevant principles.

(ii) The issues addressed in paragraph 26 appear to go to the substantive rights of taxpayers seeking to bring claims in relation to alleged fiscal aid rather than their standing. Although the principles set out here will generally be the relevant ones to apply, we would suggest also including a reference to the decision in *Laboratoires Boiron*[6] as an example of where, exceptionally, the correct remedy to an unlawful aid measure might be an unwinding of that measure.

3. The Role of National Courts (section 4 of the Draft Notice)

3.1 While the Draft Notice provides helpful guidance on how to calculate the "illegality interest" at paragraphs 82 and 83, there is overall very little guidance given to national courts on how the principal amount of aid to be recovered should be quantified (apart from that a Commission opinion may be sought on the matter).[7] The Recovery Notice provides detailed guidance on the quantification of tax reliefs at paragraphs 105 and 106, but its general guidance on quantification of aid is limited to highlighting the importance of any methodology that is set out in a Commission recovery decision. More generally, in the interest of transparency, we think it

[4] Commission Decision 2016/288, 27 March 2015; *Advocate General v John Gunn and Sons* [2018] CSOH 39 and [2020] CSIH 56.

[5] Draft Notice, paragraph 7.

[6] C-526/04, *Laboratoires Boiron,* 7 September 2006.

[7] Draft notice, paragraph 115(a).

would be helpful for the Commission to specify the procedure that should be used by national judges wishing to request guidance from the Commission in relation to specific cases.

3.2 It is clear that quantification still remains a key area of difficulty in national courts. This was seen in the *John Gunn and Sons*[8] case in the Scottish courts. The Commission could consider including some discussion of the principles established by the judgments in *Aer Lingus Ltd & Ryanair*[9] and the practical application of the principles of "restor[ing] the situation existing before the aid was granted"[10] and abolition of the "advantage unlawfully conferred on the beneficiary",[11] as well as specific guidance on measures such as guarantees (which have seen an increase in use during the COVID-19 pandemic). Guidance in these areas would assist both national courts and public authorities in seeking to ensure the full-effectiveness of European Union law and Commission decisions.

3.3 Section 4.2.3 provides some relevant clarifications on the legal consequences of an opening decision. Paragraph 52 transposes the principle contained in *Deutsche Lufthansa*,[12] according to which, following an opening decision, a national court cannot hold that the measure under discussion does not constitute aid (since otherwise Article 108(3) TFEU would be ineffective). This represents the transposition in State aid law of the principle established by the Court of Justice in the landmark *Masterfoods*[13] judgment. Paragraph 54 explains that, in cases where the Commission and the national court are seized of the same case, national courts cannot simply stay their proceedings until the Commission has reached a final decision. It may be helpful to national courts if the wording in this paragraph was aligned with that used to explain the equivalent point in paragraph 86 (the use of "may" in paragraph 86 might be understood to imply a slightly different standard to that explained in paragraph 54).

4. Cooperation between the Commission and National Courts (section 5 of the Draft Notice)

4.1 Paragraph 102 of the Draft Notice states that the support that the Commission is able to offer national courts by virtue of Article 29 of the Procedural Regulation is without prejudice to the preliminary ruling procedure under Article 267 TFEU, as demonstrated by the recent *Zennaro* case,[14] in which a request for clarification from the Commission was made in parallel with a reference for a preliminary ruling to the Court of Justice. It may be helpful to national courts to

[8] See, for example, the decision of the Scottish courts in *Advocate General v John Gunn and Sons* [2018] CSOH 39.

[9] C-164/15P & C-165/15P*, European Commission v Aer Lingus Ltd & Ryanair*, 21 December 2016.

[10] Draft Notice, paragraph 78.

[11] Ibid.

[12] C-284/12, *Deutsche Lufthansa*, C-284/12, 21 November 2013.

[13] C-344/98, *Masterfoods Ltd v HB Ice Cream Ltd*, 14 December 2000.

[14] C-608/19, *Zennaro*, 28 October 2020.

include some additional guidance on the circumstances in which it might be appropriate to consider use of Article 29 rather than the preliminary ruling procedure (or vice versa).

5. Consequences of the Failure to Implement State Aid Rules and Decisions (section 6 of the Draft Notice)

5.1 The Draft Notice (unlike the 2009 Notice) does not address the possibility of actions against Member States by third parties seeking compensation for loss suffered as a result of a failure to implement a recovery decision. The 2009 Notice at paragraph 69 addresses the possibility for such claims under the '*Francovich*[15]' and '*Brasserie du Pêcheur*'[16] jurisprudence, and we consider this would be useful to retain.

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[15] C-6/90 & C-9/90, *Francovich and Bonifaci v Italy*, 19 November 1991.

[16] C-46/93 & C-48/93, *Brasserie du Pêcheur v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others*, 5 March 1996.