Introduction and Executive Summary

1. This paper is submitted by the State aid Working Group (the “Working Group”) of the European Competition Lawyers Forum (the “ECLF”) in response to the European Commission’s consultation on the reform of State aid procedures (the “Consultation”).

2. We focus in this submission on certain specific issues raised within the Consultation and consequently this paper is not a point by point response to each question raised in the Consultation. However, for ease of reference we have set out our comments by reference to the broad subject headings identified in the Consultation.

3. In summary our key comments are:

Handling of State aid complaints

- Absent wider changes to the State aid enforcement regime, we see it as essential that the Commission continues to review and assess all complaints that it receives, as in practice (and with national courts not always fully using the powers available to them) there is often no other effective form of redress.

- For the same reason, where the Commission decides not to follow-up on a complaint, such refusal should continue to be adopted by an act that can be challenged before the General Court. Any change to this situation could undermine a complainant’s right to adequate judicial protection.

- We do however recognise the burden that this imposes on the Commission and we would support a streamlining of the process by which complaints are reviewed and responded to. It is not in the interests of any of the participants in the process for there to be prolonged delays in responding to complaints. We would also like to see an improved level of feedback to parties (including complainants) on the progress of their case and the time taken to reach a resolution.

- There is a particular need for a speedy response in un-notified aid cases. The Commission could also consider greater use of interim measures to suspend the operation of un-notified aid.

1 A list of members of the ECLF may be found at: http://europeancompetitionlawyersforum.com/. Please note that this paper has been prepared by the Working Group and does not purport to reflect the views of all ECLF members. In addition, while the Paper has been circulated within the Working Group for comment, its content does not necessarily reflect the views of the individual members of the Working Group or of their law firms.
We recommend that the Commission develops an expanded amicus curiae role with national courts for State aid cases, similar to the one existing in Regulation 1/2003.

Information gathering

The lack of a formal procedural role for the aid recipient is both an issue of principle and a practical difficulty in the State aid process. We believe that it would be possible to address this without undermining the ability of Member States to control the State aid notification process.

We would also support the introduction of procedural instruments to facilitate engagement with the beneficiaries of the measure and other third parties at the preliminary investigation phase.

Once a formal investigation has been commenced, we do not see a compelling reason why the Commission should not be given the power to send questionnaires to third parties, although we do not think that it is necessary to mandate that third parties respond to these questionnaires.
Section 1: Handling of State Aid Complaints

Complaints handling policy and lodging State aid complaints

4. The ECLF agrees that the obligation on the Commission to investigate every alleged infringement of the State aid rules that is received, from whatever source, places a material burden on its resources. We also recognise that this focus on complaints makes it harder for the Commission to prioritise and focus its work as it has been able to do in other areas, notably Article 101 and 102 enforcement.

5. At the same time however, it is important to take into account the perspective of the individual businesses that are affected by the State aid regime. Unlike under the general competition regime, there is often no real alternative method by which individual undertakings that are aggrieved by a breach of the State aid rules can seek recourse on the merits of the case. In particular there is no scope for recourse to national competition authorities, and even in clear-cut cases it is, for a number of reasons, extremely difficult to obtain an effective remedy through court actions against Member States (or indirectly against beneficiaries) for breach of Article 108(3) TFEU.

6. It is true that national courts have very wide powers, and that they have an essential role in circumstances such as un-notified aid cases, where the Commission’s powers are limited because of its obligation to conduct a full compatibility assessment before ordering recovery. National courts can and should provide remedies such as annulment, suspension, recovery orders and damages where appropriate. However, it is still difficult to obtain these remedies as was highlighted in the 2006 Enforcement Study commissioned by the European Commission, most of the conclusions of which are still valid. A remedy through the courts also may not clarify the matter as definitely for the legislator or government as a Commission decision on the compatibility assessment (which is a matter within the exclusive competence of the Commission).

7. Consequently, and at least in the absence of any wider reform of the State aid enforcement regime (which would require Treaty amendment), we would be concerned at any proposal that limited the Commission’s role or mandate for handling State aid complaints. As the sole institution with jurisdiction for assessing the compatibility of State aid measures, the Commission’s refusal to pursue a complaint in practice normally closes all possibilities of real redress for a complainant.


3 ‘Study on the Enforcement of State Aid Law at a National Level’ (March 2006). This study, which was prepared by external consultants for the DG Competition, identified a number of obstacles to the recovery of illegal or incompatible State aid including: lack of clarity as to the identity of the national body responsible for issuing the recovery decision, lack of clarity as to the procedure to recover aid, and little availability or no use of interim relief to recover aid. Private enforcement was found to be still in its infancy because of the diversity of Member States’ rules and the uncertainties (cost risks, uncertain outcome) resulting from the absence of uniform procedures with a clear legal basis.
8. It is also important that the Commission not only considers a complaint, but adopts a final decision in all cases (which can be a decision not to pursue a complaint). The obligation on the Commission, under the current system, to adopt a formal decision that can be challenged before the European courts is appropriate given its exclusive competence and ensures that an individual complainant's rights to effective judicial protection are guaranteed.

9. The ECLF recognises the time consuming and resource intensive nature of drafting formal decisions. It considers that it would be appropriate for the Commission to look at ways to streamline this procedure and take simpler, faster decisions provided that:

- it continues to adopt a measure that would qualify as a challengeable "act" for the purposes of Article 263 TFEU; and

- such act continues to provide an adequate explanation of (i) the reasons why the facts and points of law put forward in the complaint have failed to demonstrate the existence of State aid or (ii) the clear incompatibility of the measure, in accordance with the requirements of the case law.\(^4\)

10. Subject to the points identified above, the ECLF also agrees that it is essential that the Commission prioritises its caseload and targets its finite resources on cases that will have the most impact on the internal market.

11. Care will however need to be taken in articulating how the Commission will evaluate and prioritise complaints, and set its own priorities, in order to ensure that, so far as possible, the evaluation is based on the potential merits of a complaint and not on the quality of the complaint itself:

- Currently our experience is that the resources involved in pursuing, or defending, State aid allegations can be considerable. For a complaint to be taken seriously and be given priority the complainant typically needs to submit a considerable amount of information, which may require specialised external counsel (both legal and economic), and take several weeks or longer to prepare.

- Complainants with the resources to submit a complaint in this level of detail often prefer not to use the standard complaint form and opt to submit a fuller, more articulated complaint (which nonetheless contains all elements required by the form).

- However, many smaller companies are not in a position to dedicate the resources necessary to put together a complete and/or sophisticated complaint and may not have access to the necessary information to develop a complete complaint. Yet these companies may be among the most likely to suffer from the State aid

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\(^4\) See Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719 where the Court of Justice ruled that the Commission, in its final decision, must respond to facts and points of law raised by the complainant
measure as they will not have the resources to compete effectively with the beneficiary.

- This is where the Commission’s standard form complaint becomes very helpful as it allows complainants to bring a matter to the Commission’s attention relatively quickly and in a cost effective manner.

12. We would expect that whether a complainant chooses to use the complaint form or to submit a fuller complaint should not in itself affect the level of priority that a case is given.

Complaints handling procedures

13. The ECLF would like to see an expansion of the provisions of Article 20(2) of the Procedural Regulation\(^5\) in order to codify the approach of the current best practice guidelines to responses to complaints. The guidelines advise that, in circumstances where the Commission considers that a complainant has not supplied sufficient information in its complaint to convince the Commission to pursue the matter, or if on the basis of the information supplied it is only willing to treat the case as a low priority, it should make the complainant aware of this as soon as possible and provide feedback on what further information it would require in order to continue its investigation or should treat the complaint as a higher priority. In particular we would like to see express recognition that the complainant will be allowed an opportunity to respond to the Commission by rectifying/supplementing its complaint prior to a formal refusal decision being adopted.\(^6\)

14. We are also concerned that the current complaints process is not well suited to addressing cases where alleged aid has already been implemented: even if the Commission ultimately takes steps to redress the situation, the damage may already have been done. This is particularly (but not only) the case in the context of SMEs who may not have the resources to compete with an aid beneficiary during the period prior to recovery. In extreme circumstances this may result in competitors exiting the market. A two month period for an initial response to a complaint can in these circumstances seem inadequate and our experience is that even when a complaint is pursued by the Commission a substantial amount of time (we believe in some cases several years) can elapse before the Commission feels able to open a formal investigation. We would therefore favour greater priority being given to responding in such cases, and a greater willingness to progress cases if Member States are not able to address the concerns raised within a reasonable timeframe.

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\(^5\) Regulation 659/1999/EC (the “Procedural Regulation”)

\(^6\) This would also be in line with the decision of the Court of Justice in Case C-521/06 P Athinaiki Techniki v Commission [2008] ECR I-5829 where it was held that when the Commission informs the interested parties, in accordance with Article 20(2) of the Procedural Regulation, that there are insufficient grounds for taking a view on the case, it is required to allow the interested parties to submit additional comments within a reasonable period
In this context the Commission could make more effective use of its existing powers under Article 11 of the Procedural Regulation to suspend or recover un-notified aid pending the Commission's final decision. Although the desire to impose safeguards on the use of these powers is understandable, and we do not suggest that they should be deployed in a routine or mechanistic manner, the standard that is currently imposed on/applied by the Commission appears to be operating so as to prevent any use at all being made of these powers. There is also a case for a review of the substantive requirements for imposition of a recovery injunction (as evidenced by the fact that a recovery injunction has never been imposed). In particular the requirement that “there are no doubts about the aid character of the measure concerned” is likely in practice to make it difficult ever to seek recovery as an interim step.  

Other issues

We would suggest that the Commission reviews the way it assists national courts in applying Articles 107(1) and 108(3) TFEU. Currently, national courts can ask the Commission to provide: information concerning a pending Commission State aid procedure, documents in the Commission’s possession, or a Commission opinion on the application of the State aid rules.

These provisions are comparable to those applying in Article 101 and 102 cases under Article 15 of Regulation 1/2003. However, Article 15(3) also permits the Commission to submit observations (on issues relating to the application of Articles 101 and 102 TFEU) to national courts that are called upon to apply those provisions. The Commission should contemplate inserting a system comparable to Article 15(3) of Regulation 1/2003 into the Procedural Regulation. If national courts are assisted efficiently and rapidly, complainants will be encouraged to lodge complaints against unlawful aid before national courts. This would also help the Commission prioritise its caseload since it would be easier for it to re-direct complainants to seek national court remedies. We regard the last point as key to meaningful reform of State aid enforcement.

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7 Article 11(2) of the Procedural Regulation

8 ‘Notice on the enforcement of State aid law by national courts’ (2009/C 85/01) paras 77-96

9 The regulation distinguishes between written observations, which the national competition authorities and the Commission may submit on their own initiative, and oral observations, which can only be submitted with permission of the national court.
Section 2: Information Gathering in State Aid Investigations

18. We have some doubt as to whether the information gathering tools that are available to the Commission under the current rules are still sufficient.

Preliminary investigation (“phase 1”)

19. In the preliminary examination phase the Commission currently often has to reach a decision based solely on the input from the Member State concerned (which in individual aid cases will normally have been supplied with the relevant information by the aid recipient) and without any information from third parties. In non-notified aid cases the Commission may also have information provided by a complainant, but this will inevitably also only represent a partial perspective, given that the complainant mostly has its “own agenda”.

20. It is questionable whether this is necessarily and in all cases the right approach. It should be recalled that at this initial stage the Commission does not limit its assessment to determining whether an aid measure is compatible with the Treaty. The Commission will also need to determine whether (i) a measure constitutes State aid; and (ii) whether a State aid measure is de minimis (i.e. whether it affects competition and trade between Member States in a sufficient way as to justify the initiation of formal proceedings). The cases that are resolved at preliminary investigation stage can also involve substantive points of law and significant levels of investment.

21. It therefore seems surprising, by comparison with other competition procedures, that third party input is not sought at this stage and seems to create the risk that cases have to proceed to a detailed investigation simply to obtain third party input.

22. It is, of course, not necessarily the case that third party evidence will be inconsistent with that put forward by the Member State. Consequently the intervention of third parties could, in some cases, give the Commission greater comfort in its assessment on whether the impact of a measure is expected to be material and make it easier to resolve cases at the preliminary stage. For example, in situations where the application of the market investor principle is at stake in order to determine the existence of an aid measure, the view of third parties may enrich the perspective of the Commission. In addition, during the financial crisis the Commission has approved very substantial aid packages in complex “phase 1” decisions, often based on far-reaching commitments entered into by the Member State and the aid recipient. Accordingly, the input of other market players might prove to be useful (as it is standard practice in merger control and antitrust – “market testing”).

23. We would therefore support the introduction of procedural instruments to facilitate engagement with the beneficiaries of the measure and other third parties. This could take different forms. From an “effet utile” viewpoint the obvious choice would be for the Commission to have the option of sending information requests to beneficiaries of the measure (this would suspend the deadline for the Commission to adopt a decision) and of approaching other third parties directly for their views. Another, possibly less restrictive, instrument would be the publication in the Official Journal and on the website of DG Competition, once a preliminary investigation has been initiated, of a short notice
containing a summary of the facts of the case, and an invitation to third parties to submit comments or information within a prescribed (and necessarily brief) term. Once the comments have been received the Commission could decide whether the party submitting them has a legitimate interest, in which case the submission would be taken into account by the Commission and incorporated to the file.

24. In circumstances where the observations of the third party are admitted and used at the preliminary stage, this should have some consequences in terms of procedure rights for such third party, which should be granted access at least to a minimum information about the process and the outcome of its participation.

**Formal investigation ("phase 2")**

25. The concerns described above apply even more to formal investigations ("phase 2"). We believe that the publication of the summary in the Official Journal as prescribed by Article 26 of the Procedural Regulation is a suboptimal tool to get meaningful feedback from the market at the level required at this stage of the process, given that most third parties do not read the Official Journal.

26. Once a formal investigation has been commenced, we do not see a compelling reason why the Commission should not be given the power to send questionnaires to third parties as it is standard practice in merger control and antitrust investigations. Once a formal investigation has been opened then the key details of the proposals will be in the public domain anyway, so there is no confidentiality issue.

27. However, in our view, the Commission should not be unduly concerned about whether or not third parties respond to information requests – the important thing is that they have a clear opportunity to comment. If no or minimal responses are received then that in itself is indicative of the level of concern raised by a proposal.

**The role of the aid recipient**

28. The lack of a formal procedural role for the aid recipient is in our experience often a key difficulty with the current process in "individual aid" cases.

29. This is in part an issue of principle: as it is ultimately the aid recipient, and not the Member State, that is affected by recovery of the aid we believe that it would be appropriate to provide additional procedural safeguards including a right to be heard and improved rights of access to the documents on the Commission’s file (on this point we also note Article 41 of the Charter of Fundamental Rights of the European Union which, amongst other things, confirms the right of every person to be heard before any individual measure that would affect him or her adversely is taken).

30. However, it is also a practical issue: currently Member States, who are themselves resource constrained and typically do not have direct access to the information that the Commission requires, tend inevitably to be a bottleneck around the provision of information (in both directions). It would be much more efficient for the Commission to be able to deal with the aid recipient directly.
31. In addition, when it comes to the involvement of the aid recipient, the administrative practice in the Member States differs greatly. Whereas in some Member States it is basically the aid recipient and its advisors that prepare much of the notification and the detailed information requested, other Member States deny full access to the relevant documents (Commission questionnaires, Member States’ submissions, etc.). This unequal treatment is unsatisfactory, and unhelpful in seeking a speedy resolution of a case.

32. We understand that some Member States may be concerned about the implications of ceding control over part of the process to the aid recipient. However, we believe that it would be possible to balance the process in a way that would address these concerns: ultimately, even if the rights of the aid recipient (and other third parties) were to be improved, the Member State would still remain in the “driver’s seat” (i.e. it could file, withdraw and amend notifications). The Member State would, of course, have full access to the file which includes the submissions by the aid recipient (and in practice we would expect that the Member State would often be consulted by the aid recipient).

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