RECENT DEVELOPMENTS IN THE APPLICATION OF STATE AID RULES*

ECLF WORKING GROUP ON STATE AID IN THE BANKING CRISIS

The European Competition Lawyers Forum (ECLF) welcomes the opportunity to provide a brief submission highlighting its members' recent experiences and comments as regards the application of state aid rules. We commend the European Commission's efforts to engage and seek input from the ECLF (amongst others) on this topic.

This article is structured as follows: Section A briefly recalls the role of state aid enforcement in the current crisis, in particular the measures adopted by the European Commission and the exit strategies; Section B focuses on the increasing application of remedies in state aid cases; Section C deals with state aid to the real economy and the future of the Temporary Framework; Section D suggests a number of adjustments to state aid procedure in view of the ECLF members' experience; Section E refers to the recent developments and remarks in relation with the enforcement of state aid rules by national courts; and Section F is devoted to possible future developments in the field of state aid policy and enforcement.

A. The Role of the European Commission in the Crisis

Nobody would question the rationale of a restrictive policy on state aid any more. The Commission's role as a watchdog is an essential factor for the creation and maintenance of a level playing field in the internal market. This has been clearly demonstrated during the financial crisis. Excessive state intervention in favour of individual market players distorts the competitive process and it can be used by beneficiaries to pursue an aggressive competitive behaviour which would not be possible without state support.

* The views expressed in this article do not necessarily reflect the views of each ECLF member, although Working Group members have had an opportunity to comment. The working group members are Isabel Taylor, Ulrich Soltész, Paris Anestis and Edurne Navarro.

1. DG COMP and the Crisis

The financial crisis was an enormous challenge to the Commission. It is beyond dispute that the Commission has mastered this task. In a very short space of time, it has issued numerous communications, authorised various national emergency programmes and made innumerable decisions on individual cases.

During the financial crisis the Commission was faced with a choice "between a rock and a hard place". On the one hand, it had to act swiftly in saving financial institutions relevant to the system. The Commission therefore stood under immense political pressure to authorise state aid—rapidly and flexibly—to financial institutions during the financial crisis. On the other hand, rigid state aid control was shown to be more necessary than ever: a race for subsidies between the Member States would have been at the expense of the weaker countries and would have resulted in serious damage to the internal market.

The Commission has mastered this task with distinction. It acted in a considerably more rapid, efficient, pragmatic and innovative fashion than its critics had maintained that it could. This has led, of course, to a substantial increase of power for the Brussels authority. Basically all support measures which were granted to combat the crisis (injections of capital to financial institutions, provision of state guarantees, granting of other securities, measures to free bank balance sheets from "toxic assets") had to be notified to the Commission because they constituted state aid (*private investor test*: any measure available at conditions that would not have been acceptable for a hypothetical private investor under constitutes state aid;[1] because of the breakdown of financial markets, obtaining the necessary capital injections or guarantees from private market players was impossible). As a result, basically all national emergency measures needed the blessing of the Commission.

2. Increasingly Powerful Role

This has led to a new sense of self-confidence of the authority and also to a new political understanding of its own role.

Whereas hitherto the Commission used to focus its activities largely on controlling, ie approving or prohibiting state aid, today it is increasingly taking on the role of actively shaping the economic landscape. To this end the Commission makes increasingly use of the option under Council Regulation (EC) No 659/1999 Article 7(4) of "attach[ing] to a positive decision conditions . . . and . . . obligations". These conditions and obligations are regularly delivered by the Member State and the state aid recipient in the form of "commitments" made in an extensive package shortly before the decision is

[1] Case C-305/89 *Italy v Commission* [1991] ECR I-1603, para 19; Case C-482/99 *France v Commission* [2002] ECR I-4397, para 69.

issued. They contain comprehensive undertakings on the part of the state aid recipient.

The increasing popularity of the instrument can be easily explained. If a Member State notifies state aid in order to support an ailing bank, a negative decision would be inconceivable from the perspective of any of the participants (Commission, Member State, customers, business partners, capital market, etc). However, since the Commission does not want to simply "wave through" the state aid packages for banks (which have reached levels never before seen in history and which therefore of course also could distort competition considerably), it tries to soften these effects through extensive obligations as far as possible. In this respect, the development resembles the practice in European merger control, where prohibitions are now issued only infrequently, and the merging parties regularly remedy competition concerns through extensive undertakings.

In such negotiations, the Commission of course possesses considerable negotiating power. Few business leaders would reject the Commission's requests and thus endanger the existence of their enterprise. In their talks with the Commission, banks are faced with the alternative of either accepting the Commission's expectations and making far-reaching compromises, or risking a negative decision which would lead to renouncing or, if applicable, repayment of the state aid. At the same time, the Commission's exercise of its discretion in approving an aid measure has so far only been subject to very limited judicial review by the Community courts.[2]

As a consequence, the Commission has turned from a supervisor of national state aid measures into a supervisor of restructuring efforts of individual banks, thereby actively reshaping the European banking landscape through extensive commitment packages. This new "objective" of DG Competition's state aid policy was explicitly expressed by former Commissioner Kroes.[3]

3. The Legal Framework for the Crisis

Since the peak of the crisis in October 2008, the Commission has applied the specific legal basis for crisis aid measures contained in Article 87(3)b) EC Treaty (now Article 107(3)b) TFEU): "aid to remedy a serious disturbance in the economy of a Member State"). This confers a wide discretion to the Commission to approve an aid measure. The use of this legal basis has been an enormous step (in the Commission's prior decision making practice, this provision had been

2 See, eg Case C-351/98 *Spain v Commission* [2002] ECR I-8031, para 74; Case C-88/04 *Portugal v Commission* [2006] ECR I-7115, para 99.

3 See Commissioner Kroes's speech at the Fordham Corporate Law Institute's 36th Annual Conference on Antitrust Law and Policy, 24 September 2009.

virtually non-existent). It is certainly an encouraging sign that the Commission is finally starting to make use of the full range of its own powers and to adapt its rules to the current circumstances, which are more than exceptional.

In record time, the Commission has adopted four Communications concerning state support measures in favour of banks in times of crisis.[4] The first three Banking Communications (First Banking Communication, Recapitalisation Communication and Impaired Asset Communication) give guidance on how the Commission will apply Article 107(3)b) TFEU to certain aid measures to banks. The Restructuring Communication then sets out in detail the contents of the required restructuring or viability plans, and explains how the Commission will assess these plans and which follow-up and compensatory measures will be required in restructuring cases.

The Restructuring Communication will probably be the most important legal framework for the banks for the next few years. The Restructuring Communication replaces the Rescue and Restructuring Guidelines for banking cases during the crisis and applies to all bank restructuring cases notified before the end of the year 2010. One of the most important sections of the Restructuring Communication is section 2, which explains in detail the necessary information to be submitted to enable the Commission to analyse the measures envisaged to restore long-term viability in case of a restructuring plan. The Annex to the Restructuring Communication contains a detailed template of the table of contents of such a restructuring plan.

The Restructuring Communication requires far-reaching measures for returning to viability, such as the closing of loss-making business areas, the withdrawal from risky activities, as well as the concentration on the profitable core business. In cases of publicly controlled banks in Germany, for example, the Commission required the privatisation of the relevant banks[5] or at least a change in its legal nature and its internal reorganisation in order to limit the influence of politicians in the relevant governing bodies of the banks.[6] All these measures obviously have a very strong impact on the future corporate strategy and organi-

[4] Communication from the Commission on the application of state aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, [2008] OJ C270/8 (the First Banking Communication); Communication from the Commission—The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, [2009] OJ C10/2 (the Recapitalisation Communication); Communication from the Commission on the treatment of impaired assets in the Community banking sector, [2009] OJ C72/1 (the Impaired Asset Communication); Commission Communication—The return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the state aid rules, [2009] OJ C195/9 (the Restructuring Communication).

[5] Commission decision of 12 May 2009 in Case C-43/2008 *WestLB* [2009] OJ L345/1; the Commission apparently also presses for a privatisation of public banks in the pending Cases C-16/2009 *BayernLB* and C-29/2009 *HSH Nordbank*.

[6] See Commission press release IP/09/1927, "State Aid: Commission Approves LBBW Restructuring Plan and Impaired Asset Relief Measure", 15 December 2009.

sation of affected banks, and they also heavily affect the interests of the banks' shareholders.

In addition, the Restructuring Communication sets out the basic principles on commitment decisions.

B. Remedies in State Aid Law

As described in Section A.2 above, during the crisis the Commission has regularly made the adoption of an approval decision dependent on the Member States' submission of certain commitments. In practice, there is virtually no possibility for a Member State to avoid the submission of such commitments. Basically all Commission decisions allowing the urgently needed national aid schemes or individual measures in favour of banks during the financial crisis were commitment decisions.

1. General Remarks

In the financial crisis, the Commission has used commitment decisions to impose far-reaching behavioural restrictions on banks, as well as obligations to change their business structure and their future activities. These commitments will affect the business model and the market conduct of the affected banks for many years to come. This enables the Commission to permanently supervise and regulate a bank's market conduct at least as long as the aid measure remains in place, and possibly even longer.

The different compensatory measures (as well as measures to ensure appropriate "burden sharing") are described in sections 3 and 4 of the Restructuring Communication. Adequate burden sharing shall mainly be ensured by an adequate remuneration on the aid received, combined with a prohibition on paying dividends and coupons on subordinated debt if these cannot be paid out of profits generated by the bank's own activities. As compensatory measures, the Communication mentions both structural measures (divestitures) and behavioural measures, such as the prohibition to acquire competitors (non-acquisition ban), the prohibition to use state support for marketing purposes and the prohibition to offer more favourable terms on the market than competitors which do not benefit from state aid (non-price-leadership commitment).

2. Compensatory Measures—in Particular, Divestments

The Commission usually requires extensive commitments to divest (such as the sale of participations and portfolios), or to otherwise reduce the business

activities of the aid recipient (reduction of branches, cessation of certain business activities and production areas, etc).

Regarding the necessary scope of balance sheet reductions, the Commission now appears to be demanding a much larger reduction than prior to the crisis. In banking cases before the crisis, the Commission usually required a reduction of the balance sheet of around one-third (Bankgesellschaft Berlin, Crédit Foncier de France, Societé Marseillaise de Crédit, Banco di Napoli and Crédit Lyonnais). Now, the Commission usually imposes a reduction of around 50%. Examples are IKB (47.2%), Commerzbank (45%), Fortis (40%), WestLB (50%) and BayernLB (at least 50%). If the aid amount received by a bank was particularly high or a bank had to ask repeatedly for substantial rescue aid measures, the bank has to expect that the Commission requires a balance sheet reduction of more than 50%. Examples are Northern Rock (the balance sheet size of the remaining "good bank" will only be around 20% of the initial balance sheet size before the crisis) and Hypo Real Estate.

A significant reduction of a bank's balance sheet can conflict to some extent with the main objectives of the national aid schemes. Thus, a significant reduction of a bank's balance sheet may to some extent only be achievable by granting fewer—or less risky—loans. This conflicts with the aim to ensure lending to the real economy and in particular to small and medium-sized firms.

The commitment packages will lead to a high number of sales in the coming years. After this wave of mergers and acquisitions (M&A) activity, the European banking landscape will not be the same anymore. It remains to be seen whether the Commission's interference in the structure and conduct of financial institutions will be positive or negative for the functioning of the financial sector, the real economy and the competitive position of European banks as compared to their American and Asian competitors.

One serious concern is that the imposition of far-reaching divestiture obligations in a large number of cases may lead to systemic effects and distortions of competition that can currently not be foreseen. This will be particularly dangerous given that many banks will be obliged to divest in more or less the same time frame. There is no historical precedent for such a wave of M&A activity in the same sector. The fact that there will a substantial number of banks and assets for sale but only a limited number of potential purchasers available might make things difficult.

Since numerous European banks that have received state aid are under an acquisition ban themselves, they will not be able to take part in the bidding processes. It will therefore mainly be financial institutions from non-EU countries and investors from other areas, ie non-banking sectors, which will be able to purchase the banks that are for sale. This might ultimately lead to a disadvantage for the EU financial service industry. After the consolidation process is completed, the European players in the banking markets

might be, in an international scale, much smaller than their non-EU counterparts. Such a result would be contrary to former statements of the Commission, in which the relatively small size of European banks has very often been deplored.[7]

3. Behavioural Commitments

In addition to the structural remedies, the Commission imposes behavioural commitments on banks.

For example, the beneficiary banks usually have to assume a "non-price-leadership commitment"—a prohibition to offer more favourable conditions for certain of their products than their main competitors in the relevant markets. Such a commitment stifles price competition and can harm consumers, and thus may contain an anticompetitive element. The necessity for beneficiary banks to avoid a breach of this commitment also provides incentives to engage in competitor contacts to find out about the prices and conditions of the other market players' products, which can lead to an infringement of Article 101 TFEU.

Moreover, the Commission also imposes an acquisition ban for some years in order to prevent the aid from being spent on financing expansion ("shopping tour"), rather than restructuring or lending to the real economy. The implementation of such a commitment has proven to be difficult. In particular, it can be questionable whether such a commitment to abstain from acquisitions includes minority shareholdings for investment purposes, and whether the commitments extend to the worldwide activities of beneficiary banks or are limited to the EEA.

Answers to all these questions will have to come from the Commission. The supervision of the commitment packages places an enormous administrative burden on it. The Commission will be the central authority to solve interpretative problems and decide on the appropriateness of the behaviour of banks. In the meantime, it appears that the Commission seeks to delegate the supervision of compliance with the commitments to independent trustees.

4. Own Contribution

One apparent relaxation of the Rescue and Restructuring Guidelines appears to be the extent of the required own contribution of the state aid recipient. The

[7] See speech of Commissioner McCreevy, European Parliament Hearing on Cross-border Consolidation, 31 January 2006: "there are *hardly any large European financial institutions of a truly global size*" (emphasis added); speech of Commissioner McCreevy, presentation before the Council of Economy and Finance Ministers (ECOFIN), 8 November 2005: "Given the fierce global competition that is emerging, *we cannot afford to have* 25 medium-sized markets made up of *second-division champions*" (emphasis added).

Commission recognised relatively early that, in times of a financial crisis, a strict requirement of an own contribution of 50% is unrealistic.[8] For a sufficient own contribution of the beneficiary, the Commission mainly insists on an adequate remuneration for the aid measure in question.

On the other hand, however, the Commission appears to be particularly keen to ensure that the shareholders and creditors of other Tier-1-capital instruments share a sufficient part of the beneficiary banks' losses and the restructuring costs. To this end, the Commission usually insists on a ban on dividend payments to shareholders over a certain period of time. Additionally, the banks involved usually have to undertake to pay interest and coupons on hybrid instruments (silent contributions, profit and loss participation rights and certificates) only if there is a binding legal obligation to do so. Although the requirement of an "own contribution" is based on legitimate concerns, it can delay the desirable exit of the state, since it will make it more difficult to raise private money.

We would also be interested to discuss the Commission's current intentions as regards a review of the Rescue and Restructuring Guidelines ahead of their expiry in October 2012. We assume that at this stage it would be premature to discuss the contents of the review. However, it could be interesting to discuss the extent to which the Commission anticipates that there will be a case for some updating in light of recent experience (eg as regards the 50% own contribution rule).

5. Exit Strategies

Most individual decisions are based on a restructuring plan, which usually contains a schedule for the "state exit", ie the replacement of public capital. However, the exit of the state means that public money would have to be replaced by private capital. This might turn out to be difficult in a situation where the states withdraw simultaneously from a number of banks. If a number of banks seek to raise large amounts of private capital at the same time, this might lead to distortions in the capital market and also squeeze lending capacity to the real economy.

The remaining key question will therefore be whether the implementation of the commitment packages will be adjusted to a new market situation. This is possible under the current framework (most of the commitment packages contain a "review" clause) but requires some flexibility from all parties involved. We are confident that Commission will meet this challenge.

[8] Commission decision of 7 May 2009 in Case N 244/2009 *Commerzbank* [2009] OJ C147/4, para 85; Commission decision of 7 May 2009 (decision to open formal procedure) in Case C-15/2009 *Hypo Real Estate* [2009] OJ C240/11, para 55.

C. State Aid to the Real Economy

1. Prolongation of the Temporary Framework

In addition to aid for financial institutions, it became clear that specific aid instruments would be necessary to ensure access to finance for undertakings in the real economy. The European Commission has published the Temporary Framework[9] to deal with state aid issues arising in the real economy during the economic crisis. The Temporary Framework has proven to be an adequate means for state aid on which Member States and companies have relied heavily to limit the negative effects of the crisis. The Commission has concentrated the use of the Temporary Framework in aid schemes, although it also used it for at least one ad hoc aid.

The Temporary Framework is currently limited until the end of 2010. An important question for businesses is whether the European Commission expects or advocates a prolongation of the Temporary Framework—a question that is becoming more urgent as it approaches its expiry date. It is important to clarify these questions now in order to avoid the distorting effects of companies running for last minute aid under the Temporary Framework.

If the Commission proposes a prolongation of the Temporary Framework, it must address several follow-up questions:

1. Does the prolongation of the Temporary Framework concern the date of granting or the end date for the favourable conditions?
2. Is the cut-off date of 1 July 2008 still appropriate in the case of a prolongation, in particular if aid under the Temporary Framework could be granted until the end of 2011 or any other date chosen by the Commission?
3. Will the Commission in the future require proof that the difficulties stem from the financial and economic crisis or will it remain sufficient that the company has not been a firm in difficulties (FiD) at a given cut-off date (1 July 2008)?
4. If the European Commission prolongs the Temporary Framework, how will it deal with the fact that the approved national schemes are all expiring at the end of this year? Will the Commission consider a wider application of the Temporary Framework to individual cases that are potentially better equipped to fine-tune the aid granted under the Framework?
5. Would the European Commission consider a sectoral approach to the prolongation, focusing on sectors where the assumption that any

[9] Communication from the Commission—Temporary Framework for state aid measures to support access to finance in the current financial and economic crisis (consolidated version), [2009] OJ C83/1. The Temporary Framework has since been amended in some minor aspects.

difficulties after 1 July 2008 stem from the crisis still holds? What are or would be the real economy key sectors that the Commission is watching?

2. Relation between Temporary Framework and R&R Aid

While the Temporary Framework was generally successful in helping the real economy access to financing means, it has created a novel problem: the choice between different types of aid for companies in difficulties. These problems may have been limited in the first months of the Temporary Framework, but we expect them to become more important if the Temporary Framework is prolonged.

The Temporary Framework allows Member States to grant aid (over and above rescue and restructuring (R&R) aid) to companies that have not been a FiD on 1 July 2008. In particular, it allows Member States to grant aid to companies that are a FiD at the time of the granting of the aid. Without explicitly stating it, the Temporary Framework is an exception to the rule that FiDs can only receive R&R aid. This makes for an uneasy relationship between the Temporary Framework and the R&R Guidelines, which becomes more difficult the longer the time passed since the cut-off date of 1 July 2008.

The Temporary Framework is applicable to firms "that were not in difficulty at that date [1 July 2008] but entered in difficulty thereafter as a result of the global financial and economic crisis". This could indicate a restriction in the sense that a FiD (at the time of granting) can only receive aid under the Temporary Framework if it became a FiD "as a result of the global financial and economic crisis". Other FiDs could not receive aid under the Temporary Framework even though they were not in difficulties on 1 July 2008. Some Member States may have integrated such an additional restriction in their schemes under the Temporary Framework (the language is not always clear). The Commission decision practice does not apply such an additional restriction. It appears that the Commission makes an assumption that every company that was not a FiD on 1 July 2008 became a FiD because of the financial crisis. This assumption obviously made sense at the beginning of the crisis, though it may become more questionable as time goes by.

The Temporary Framework allows aid for FiDs without any restructuring requirement or own contribution. By contrast, the R&R Guidelines allow R&R aid to FIDs only under very restrictive conditions. The Commission practice does not make any distinction between companies that are FiDs following the economic crisis and FIDs whose difficulties have nothing (or little) to do with the financial crisis. It may be distortive to allow the aid measures under the Temporary Framework for all these companies. For future advice under the Temporary Framework, it would be important that the Commission clarifies its position on this issue, in particular if the Temporary Framework is prolonged beyond the end of this year.

Member States may have difficulties assessing the exact scope of the conditions to be fulfilled for aid granted under the Temporary Framework (or aid schemes approved under the Framework). This may have led some Member States to add the requirement that aid under such a scheme will only be granted if a company is a FiD at the date of application, thus favouring aid that is presumably of the most distortive kind while excluding aid to companies that have difficulties in accessing finance but are not technically speaking a FiD. We would welcome informal guidance and clarification from the European Commission to Member States on this point.

D. Process Issues

There is strong support within members of the ECLF for the recent initiatives by the Commission to modernise and improve the procedural aspects of state aid case handling. We would welcome informal feedback from the Commission on its experience to date with the procedural innovations that have been introduced as part of the Simplification package.

We would also be interested to understand the likely next steps and, in particular, whether the Commission is looking at revisions to the legislation in this area (we note that Commissioner Almunia, in his statements to the European Parliament, indicated an interest in reviewing the scope to "modernise and expedite" state aid control procedures).

Our view is that there would be a case for the Commission to lead a wide-ranging public debate and review of the procedural framework applying to state aid cases—similar to those carried out in relation to reforms of the merger control and the antitrust regime in 2003/4—and that significant further reforms are likely to require legislative action. Particular issues that we would highlight in this context include the following.

1. The Overall Structure of the Process

It is a feature of the state aid process that, following notification of proposals to the Commission, the initial dialogue is conducted solely between the parties to the process. Other "interested parties" only acquire rights to submit comments once a formal investigation has been opened. This is in marked contrast to the process on merger control cases, where the Commission routinely seeks third-party input during "phase 1", and in antitrust cases, where the Commission has the power to seek information from third parties even at a preliminary stage of the investigation.

Whilst we recognise that the differences in approach reflect differences in the current legislative basis for action by the Commission, our view is that the relatively "closed" nature of the initial stages of the state aid procedure is

increasingly anomalous and, because it can mean that not all relevant views are known at the initial stages, not necessarily helpful to a speedy resolution of the case (in fact it may provide unnecessary incentives to open a full investigation).

It also seems to us that the emphasis that is now being placed on pre-notification (which, by its nature, is a bilateral process between the Commission and the notifying parties) provides a further reason for reform of the initial review stage to allow for wider participation.

2. The Role of the Recipient of the Aid in the Process

It is normally the potential recipient of the aid that has the most direct interest in ensuring that the state aid process is properly and expeditiously conducted.

In particular, the recipient:

- has an interest in ensuring that necessary state aid notifications are made—in cases where the need for a notification is unclear, the recipient of the aid typically has much more to lose than the Member State if the wrong decision is made;
- is normally the party who is best placed to provide the detailed information and explanation that the Commission requires in order to form a view on the case.

However, the recipient has very little right of access to the Commission either to confirm its position or to provide information at the initial stages of the process. It also has only limited access, if any, to documents that have been exchanged between the Member States and the Commission, although they may materially affect its economic and legal position. Our understanding is that practice varies as regards the willingness of Member States to involve the aid recipient, particularly in the early stages of a case.

We would therefore favour a formal recognition of the status of the aid recipient. We recognise that the precise manner in which the aid recipient is integrated into the process may have to vary, depending on the circumstances of the case. However, we believe that it would be possible to recognise the principle that the recipient should have access to the Commission at the initial stages of a state aid process (and vice versa).

Given differences in practice on this issue between Member States, a formal legislative provision in this regard may be required. However, we believe that the Commission could also assist at a more informal level (reinforcing the messages that are already included in the Best Practices Code) by encouraging Member States to involve the aid recipient in the process, explaining why this is advantageous and where appropriate querying decisions to exclude the aid recipient.

3. Complaints Handling

We support the steps that have been taken through the Best Practices Code to give a more precise timetable for the handling of complaints. Members of the group report positive experiences in dealing with the Commission in state aid complaint cases.

However, we note that access to information, for complainants, remains very much a matter of goodwill. Whilst the Best Practices Code foresees that a non-confidential version of the complaint be transmitted to the Member State concerned for comments, there is no reciprocal provision for a non-confidential version of the Member State's response to be supplied to the complainant.

We would also like to discuss the scope that exists to get greater clarity from the Commission as to whether a case would be likely to be categorised and handled as a priority or a non-priority case in advance of significant resources being invested by the complainant in preparing a complaint.

4. Timetabling

A frequent concern for parties that are involved in state aid proceedings is that either the time that will be required in order to obtain clearance will simply be too long to be compatible with a commercial timetable, or that the timetable will simply be too uncertain to allow other aspects of a transaction to be planned around it.

We are therefore enthusiastic about the proposals for "mutually agreed planning" that are specified in the Best Practices Code. We would be keen to understand the extent to which this procedure has been deployed in practice and the experience that the Commission has had in enforcing deadlines for comments from Member States and third parties as outlined in the Code.

Whilst we recognise that the introduction of fixed timetables for the resolution of state aid cases may be challenging, we would be interested to discuss the scope to use "softer" initiatives, such as publication of statistics on the time taken to resolve cases in order to drive incentives to efficiency in this area. We also believe that greater involvement of the recipient of the aid (who, for the reasons discussed above, has a direct interest in the speedy resolution of these proceedings) would be helpful in encouraging stricter adherence to agreed timetables.

5. State Aid Advocacy

As a general proposition, we find that state aid continues to be perceived by undertakings (whether recipients of aid or third parties) to be a highly political process, and that this in turn leads to uncertainties as to whether a level playing field is applied as between different sectors or different Member States.

We therefore believe that there continues to be a strong advocacy role for the Commission to play in relation to the state aid process as a whole and that it would be beneficial to the process as a whole to increase confidence on this point. We expect that improvements in process and transparency of the type discussed above, and as already seen in the Simplification package, will be of assistance in achieving this. However, we see a case for going beyond informal amendments to the procedure and believe that a proposal for formal legislative change would also be beneficial in raising the profile of the reforms.

E. State Aid Enforcement at National Level

The members of the ECLF welcome the update by the European Commission of its guidance to national courts as regards the application of state aid rules at national level by virtue of the 2009 Notice on the enforcement of state aid law by national courts (the Notice).[10] We also consider very positively the 2009 update of the 2006 Study on the enforcement of state aid rules at national level (the Reviewed Study).

The ECLF understands that experience under the Notice has been so far rather limited, in particular since only one year has elapsed since its publication. However, the Reviewed Study provides an overview of the evolution of the practice by national courts since 2006. The conclusions of said update should still be fully applicable today as a basis for discussion purposes.

In this respect, we would welcome informal feedback from the Commission on its experience and reflections in relation to certain aspects of the enforcement by national courts of state aid rules. In particular, we would like to make the following remarks:

- The Reviewed Study identifies that there has been an increase in the number of state aid cases dealt with by national judges, but the cases are unequally distributed (there are more cases in old Member States than in "new" ones). A better enforcement in new Member States could be promoted by trainings or even exchanges of personnel between Member States. An improved application of state aid rules by national authorities in a homogeneous way throughout the EU would help grant a level playing field and ensure that potential competitors in the said markets will have equivalent access to private enforcement as in any other Member State.
- The Reviewed Study concludes that there is an increasing number of recovery actions before national courts. However, national courts would still be reluctant to grant compensation for damage to competitors of the beneficiary of the aid. In this respect, we share the study's conclusion that

[10] [2009] OJ C85/1.

there is not yet a real damages practice as regards state aid cases. This could be due to the high burden of proof required before national courts in order to establish the existence of aid, the damages and the link between both.

As regards the burden of proof related to the existence of aid, one of the difficulties is having access to the information necessary to demonstrate that the market investor principle is not fulfilled in a specific case, as well as quantifying the aid, in particular in order to request recovery of the aid.

In relation to the burden of proof as regards the damages and their link to the illegal state aid granted, additional issues arise, such as the difficulty to claim compensation from the state for damages caused to an individual, especially in cases of state aid granted in the framework of a general scheme.

- Another of the issues identified in the Reviewed Study is the identification of the national courts dealing with state aid cases. We consider that procedural aspects may render more difficult the private enforcement of state aid rules before national courts. Indeed, it is not always evident under national law before which jurisdiction said claims should be raised. As an example, in Spain the Supreme Court has recently declared that an action for declaration and recovery of an illegal state aid granted by the state, as well as a damages action against the state for the granting of said aid, has to be brought before the administrative courts, declaring that civil courts lack competence on this issue.[11] In contrast, the commercial courts in Spain would be competent as regards infringements of Article 101 and 102 TFEU.

Although this issue is a matter of national procedural law, the difficulty of the claimants to identify the correct legal basis to claim for recovery (national laws often do not include specific references in this respect) and damages in illegal/incompatible state aid cases may be a strong deterrent factor for potential claimants.

- As regards the intervention of the Commission as amicus curiae in national proceedings, this possibility has been used in only a few cases that have been identified in the Reviewed Study. This possibility is particularly welcome in order to allow the courts to obtain guidance on the application of state aid rules. However, this should not unduly discourage judges from requesting a preliminary ruling from the ECJ. The latter, although more lengthy, can provide more legal certainty.

[11] Judgment of the Civil Chamber of the Supreme Court of 15 October 2009, where Europa Press Noticias, SA claimed before the civil/commercial courts against the Spanish Administration and Agencia EFE, SA for unfair competition. The claimant had also requested the state to refrain from granting any further payments of the illegal aid, and to order the recovery of the amounts already paid and the payment of damages resulting from the unfair competition by the state.

Further, the European Commission's guidance on a certain case—which is not binding for the national judge—cannot be challenged by the parties. This is particularly relevant since the guidance will be issued by the Commission without the parties being heard.

F. Future Developments

The financial and economic crisis has been a central aspect in DG Competition's activities in the last two years, with a clear focus on state aids to the financial sector and, to a lesser extent, to the real economy. However, the temporary frame foreseen in the banking communications and in the Temporary Framework are about to expire.

In this respect, it cannot be excluded that, while the economy of certain Member States may be sufficiently recovered to promote the end of general aid schemes, other Member States may need an extension of the measures beyond the period initially foreseen by the Commission in its Communications. We would like to know whether the Commission intends to extend the application of the exception under Article 107(3)b) TFEU for some Member States, while, as regards the Member States which have sufficiently recovered, the Commission would go back to its pre-crisis state aid enforcement practice.

Finally, we would like the Commission to comment on its future priorities in the state aid field for the next year and whether it expects that the consequences of the crisis will still play a major role or, if applicable, in which other policy fields the Commission will concentrate its efforts.