

21 October 2008

Commission Notice on the Enforcement of State Aid Law by National Courts

1. INTRODUCTION

BUSINESSEUROPE welcomes the publication of a Commission notice setting guidelines to assist Member States' courts in applying EU State aid rules.

State aid rules play an important role in the regulation of the Internal Market. State aid control is the result of the need to maintain a level playing field for all undertakings in the internal market, no matter in which Member State they are established.

The guidelines are aimed at supporting national courts and potential claimants in relation to domestic State aid issues. In addition, BUSINESSEUROPE welcomes the possibility for national judges to consult the Commission for information or opinions on the application of the State aid rules.

The need to focus on efficient State aid enforcement in the EU is supported by the spring 2008 State Aid Scoreboard.¹ According to the Scoreboard, around € 7 billion of unlawful and incompatible aid had been effectively recovered by the end of December 2007. BUSINESSEUROPE is concerned about the quantity of unlawful and incompatible aid and the large number of non-notified State aid measures. These concerns were already highlighted during the consultation on the (recently adopted) General Block Exemption Regulation, which allows even more aid to be exempted from the Commission's centralised control.

2. GENERAL COMMENTS

BUSINESSEUROPE supports the Commission's broad objectives: we have on several occasions in the past pointed to the need to improve the efficiency of the national courts as a means of obtaining redress against the illegal provision of State aid. For example, BUSINESSEUROPE has in the past urged the need for a remedies directive, which could harmonise the rights of parties, the nature of the remedies available and procedural and other rules. Amongst other things, the ability to obtain speedy injunctive relief is of particular importance.

BUSINESSEUROPE also believes that independent State aid authorities (akin to the national competition authorities) could play a role as regards facilitating the task of the Commission in relation to detection and provisional recovery of illegal aid and execution of recovery decisions. This would help establish the necessary division of power between the twin roles of Member States as both policemen and donors. Amongst other things, this division has become more important with the increasing

¹ COM (2008) 304 final.

decentralisation of State aid control as a result of the recent block exemption regulation. It is regrettable that the Commission has not made any concrete proposals in this context yet.

BUSINESSEUROPE has on several occasions underlined the following problems related to enforcement and application of State aid rules by national courts:

- There are genuine difficulties in bringing (cross-border) cases before national courts and to use them as enforcers of state aid rules. Third parties often lack the incentive to bring a case of illegal aid before the national courts as the costs of litigation may exceed possible benefits. Third parties often lack investigatory powers and may therefore be unable to establish that illegal aid was granted.
- National courts are not always sufficiently familiar with EC state aid rules to deal adequately with questions of illegal aid, and foreign competitors may lack knowledge of the relevant legal system, while national competitors may have inhibitions to start a legal action against their own government.

The new draft on the Enforcement of State Aid Law by National Courts deals with many of the issues referred to above. Furthermore, the notice deals with some practical questions raised by recent case law, especially the CELF-judgement (C-199/06). BUSINESSEUROPE therefore greatly welcomes the Commission suggestions to improve enforcement of State aid rules by national courts.

3. SPECIFIC COMMENTS

Commission support to national courts

According to point 94 in the draft, the Commission will endeavour to provide the national court with the requested opinion within four months from the date of the request. This is an improvement compared to the 1995-cooperation notice, where it was stated that the Commission should answer requests for legal and factual information "in the shortest possible time".

However, the proposed four months time limit should be shortened. In order to improve the effective application of Article 88 (3) EC by National courts, a one month time limit seems more appropriate.

Reporting and information

In point 98 in the draft, the Commission declares its intention to publish a summary concerning its cooperation with national courts, pursuant to the notice in its annual Report on Competition Policy. BUSINESSEUROPE encourages the Commission to publish its opinions and observations on its website.

BUSINESSEUROPE supports these instruments aimed at increasing transparency and knowledge sharing of enforcement of state aid law by national courts. In this context, it also suggests that national courts should have an obligation to inform the Commission of any judgement related to the application of State aid rules.

A similar obligation already exists in Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and in the Commission Notice² on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC. According to regulation and the notice, Member States shall send to the Commission a copy of any written judgement of national courts applying Articles 81 or 82 EC without delay after the full written judgement is notified to the parties.

Limitation period

According to article 15 in Council Regulation (EC) No 659/1999 the powers of the Commission to recover aid shall be subject to a limitation period of ten years. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period. Each interruption shall start time running afresh.

However - in the light of the CELF judgement - BUSINESSEUROPE believes there is a need to clarify if the same principles shall apply to national courts in the case of unlawful but compatible state aid. Clarification is also needed as to whether the Commission's rules of interruption also apply in a national forum. The Commission should clarify these issues in the notice.

Revision

BUSINESSEUROPE believes the notice should include a revision provision. This provision could have the following wording "Five years after the date of the application of this notice, the Commission shall report to the Member States on the functioning of the notice. On the basis of this report, the Commission shall assess whether it is appropriate to propose a revision of the notice".

Training of national judges

On 4 June 2008, the European Parliament's Committee on Legal Affairs published a report³ on the role of the national judge in the European judicial system. The report showed significant disparities in national judges' knowledge of Community law across the European Union. BUSINESSEUROPE believes that promoting training of national judges on State aid law would be a useful tool to tackle this problem. Similar initiatives have been taken in the context of articles 81 and 82 EC, with the Commission financing initiatives aimed at training national judges in EC competition law and judicial co-operation.

Finally, BUSINESSEUROPE suggests that the notice could be accompanied by a guide addressed to companies. Such a guide would be a useful tool to raise awareness on the importance of free and fair competition throughout the Single Market.

² 2004/C 101/04.

³ 2007/2027(INI).