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DO THE COMMISSION'S PROCEDURES
ENSURE EFFECTIVE MANAGEMENT OF
STATE AID CONTROL?



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(pursuant to Article 287(4), second subparagraph, TFEU)

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REPLY OF THE COMMISSION

ACRONYMS AND ABBREVIATIONS

BPC: Best Practices Code

CP: 'Cas présumé' (either complaint or ex officio investigation)

Ex officio (Latin): By virtue of office or position; 'by right of office': in State aid matters, it is used to refer to own-initiative investigations, when Competition DG takes the initiative to examine and/or decide to launch an investigation of an alleged unlawful aid

(G)BER: (General) Block Exemption Regulation

GDP: gross domestic product

MAP: Mutually agreed planning

PETRA: Pilot Experiment Time Reporting Application

PN: Pre-Notification

R & D(& I): Research, Development (and Innovation)

REQ: Request for information

SAAP: State Aid Action Plan

SANI: State Aid Notification Interactive (software used to notify State aid)

SME: small and medium enterprises

SP: Simplified Procedure

TEC: Treaty establishing the European Community

TFEU: Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

I.

EU Member States are required to notify all planned State aid measures to the Commission and to obtain the Commission's approval before implementing these measures. State aid control in all sectors except agriculture and fisheries falls under the responsibility of the European Commission's DG for Competition.

II.

The Court considered whether the Commission's procedures ensure effective management of State aid control, assessing in particular whether:

- (i) the system of notifications, complaints and ex officio enquiries ensure that the Commission handles all relevant State aid cases;
- (ii) the Commission has adequate management structures and procedures in place for effective handling of the State aid cases within the deadlines;
- (iii) the Commission monitors the impact of its State aid control.

EXECUTIVE SUMMARY

III.

The Court's findings relate to an audit made in the Commission and in eight Member States selected for the audit. The Court found that:

- the Commission has made efforts to ensure that all relevant State aid cases are handled but its systems do not guarantee that all aid is captured;
- the procedures for notified State aid take a long time;
- complaints continue to take a long time to resolve and the procedure is not transparent;
- the Commission reacted promptly to the financial crisis;
- the Commission does not assess the *ex post* impact of its State aid control in a comprehensive way.

IV.

On the basis of these observations, the Court recommends the Commission:

- to review the allocation of resources devoted to State aid control, in order to be more proactive in raising Member States' awareness of State aid rules, to step up its monitoring activities and to organise its *ex officio* enquiries in a more systematic and targeted way to detect illegal aid;
- to increase the transparency of its case-handling procedures, by more regularly informing the stakeholders of the progress of the case and opening formal investigation procedures more quickly;
- to shorten the duration of the procedures, e.g. by limiting the number of Requests for Information to Member States and dealing swiftly with unfounded complaints;
- to implement an enhanced system of time recording and management reporting to optimise the allocation of resources;
- to regularly assess the *ex post* impact of State aid control on companies, markets and the overall economy.

INTRODUCTION

1. The European Commission has overall responsibility to ensure effective State aid control. Competition DG has the lead responsibility for the management of EU competition policy. Agriculture and Rural Development DG and Maritime Affairs and Fisheries DG are responsible for State aid control in the areas of agriculture and fisheries. Competition DG is responsible for State aid control in all other economic sectors.

2. The legal basis for the Commission's State aid control is given in Articles 107 to 108 TFEU (see paragraphs 3 and 8 and **Annex**). A Council regulation (the Procedural Regulation¹) and a Commission regulation (the Implementing Regulation²) set out in detail how the Commission carries out its responsibilities. The Commission issues communications and guidelines which are intended to give further explanations of how the rules apply in practice.

3. Article 107(1) TFEU defines State aid as 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States'. Four cumulative criteria need to be met for an aid measure to constitute State aid:
 - o involve a transfer of State resources;
 - o entail an economic advantage for undertakings;
 - o distort or threaten to distort competition by selectively favouring certain beneficiaries; and
 - o have the potential to produce an effect on intra-Union trade.

Therefore, subsidies granted to individuals or general measures open to all enterprises do not generally constitute State aid. The aim of the Commission's rules is to ensure that State aid granted by Member States is compatible with the internal market.

¹ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (now Article 108 TFEU) (OJ L 83, 27.3.1999, p. 1).

² Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 (OJ L 140, 30.4.2004, p. 1).

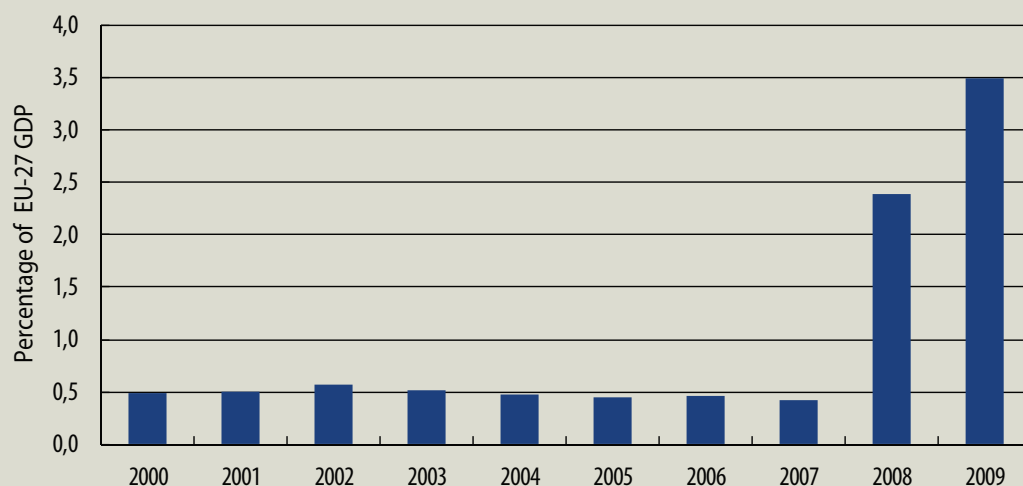
4. State aid is provided in different ways. The most common forms are grants and tax exemptions. Other instruments are soft loans, guarantees, tax deferrals and equity participation. State aid can be granted by national/federal, regional or local government, as well as government-controlled entities.
5. The Lisbon European Council in March 2000 set the objective of 'less and better targeted State aid'. State aid³ to the industry and services sector (excluding railways, other transport, agriculture and fisheries) fluctuated around 0,5 % of EU-27 GDP until the outbreak of the financial crisis in the second half of 2008, but rose to 3,5 % of GDP or 410 billion euro in 2009, which is the highest level since the Commission started its State aid surveys in 1990 (see **Figure 1**). State aid granted to the financial sector in the context of the financial crisis represented 351,7 billion euro in 2009 or 2,98 % of EU-27 GDP, and is therefore responsible for most of the increase in State aid in 2008–09⁴.

³ As defined by Article 107(1) TFEU; see also paragraphs 88 to 89 for the types of aid that are excluded from the Commission's statistics.

⁴ Source: COM(2010) 701 final of 1 December 2010 — State Aid Scoreboard Report on State aid granted by the EU Member States — Autumn 2010 Update.

FIGURE 1

STATE AID TO INDUSTRY AND SERVICES IN THE EU (AS % OF EU-27 GDP)



Source: European Commission.

6. In 2005, the Commission presented a State Aid Action Plan (SAAP)⁵ to make State aid rules better contribute to sustainable growth, competitiveness, social and regional cohesion and environmental protection. The SAAP was based on the following principles: less and better targeted aid; a refined economic approach; more effective procedures, better enforcement, higher predictability and enhanced transparency; and a shared responsibility between the Commission and Member States. The SAAP was gradually implemented between 2005 and 2009.
7. The SAAP in particular highlighted the need for better targeted enforcement and monitoring as regards State aid granted by Member States and stressed that private litigation before national courts could contribute to this aim by ensuring increased discipline in the field of State aid. In April 2009, the Commission issued a new Notice on State aid Enforcement by National Courts giving detailed guidance and raising awareness of its possible use as an alternative and a complement to enforcement through the European Commission. However, recourse to Court proceedings at national level is still not widespread⁶.
8. Article 108 TFEU (see **Annex**) requires EU Member States to notify all planned State aid measures to the Commission and to obtain the Commission's approval before implementing these measures (except for those measures that the Commission has exempted from notification) (see paragraphs 19 to 25). The Commission is the only authority which can declare a State aid measure compatible with the Treaty and has large discretionary powers in that respect.

⁵ COM(2005) 107 final of 7 June 2005 — State aid action plan — Less and better targeted State aid: a roadmap for State aid reform 2005–09 (Consultation document).

⁶ Several stakeholders expressed difficulties about the use of private enforcement of State aid rules as it is difficult for competitors to gather information about the alleged incompatible aid and it is more costly than a complaint to the Commission.

9. The Commission can either decide that the measure does not constitute aid, decide to approve or launch a formal investigation. All decisions must be adopted within two months following the receipt of a complete notification⁷. Competitors or other interested parties who believe that a certain measure constitutes State aid can complain to the Commission. The Commission can also take the initiative to launch an investigation (ex officio) into certain alleged State aid measures.
10. Notifications and complaints are examined in two phases (see **Figures 2** and **3**). The first phase consists of a preliminary investigation to determine if the notified measure constitutes State aid, and if so, if it is compatible State aid⁸. Where the Commission, after a preliminary investigation, finds that doubts are raised as to the compatibility with the internal market, it shall decide to open a formal investigation procedure. During the entire procedure, the notifying Member State has the possibility to modify the notified measure(s) in order to make it compatible.
11. While the procedure during the first phase is essentially between the Commission and the Member State the second phase is more transparent, as the opening decision is published and all interested parties (including the aid beneficiaries and competitors) have the right to submit comments.

⁷ See Article 4.5 of the Procedural Regulation. The notification will be considered as complete if, within two months from its receipt, or from the receipt of any additional information requested, the Commission does not request any further information. If the Commission asks for further information (by sending a request for information (REQ)), a new two-month period starts when the Member State submits the information requested.

⁸ Article 4.2 to 4 of the Procedural Regulation.

FIGURE 2

SIMPLIFIED OVERVIEW OF THE PROCEDURE FOR NOTIFIED AID

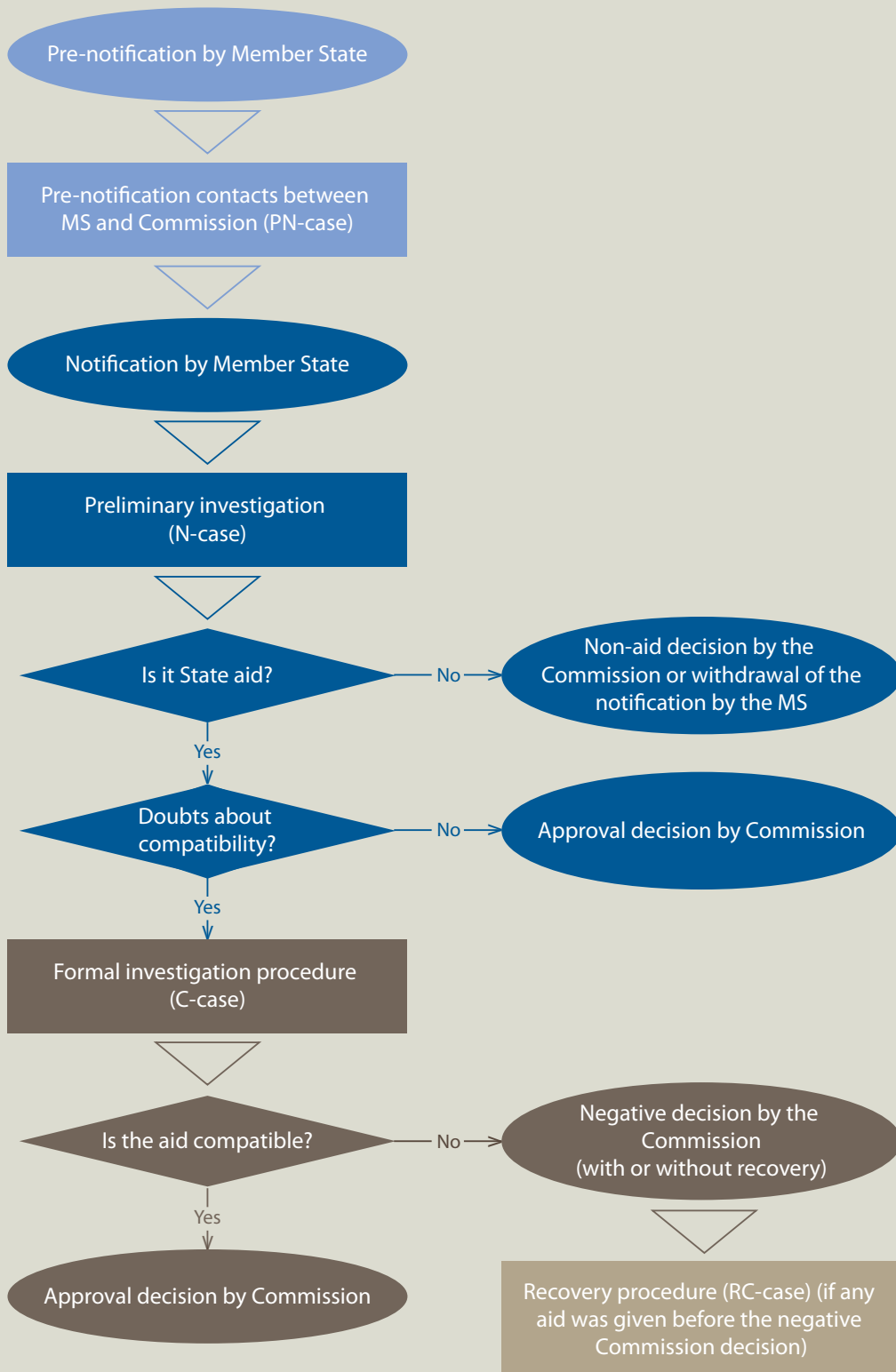
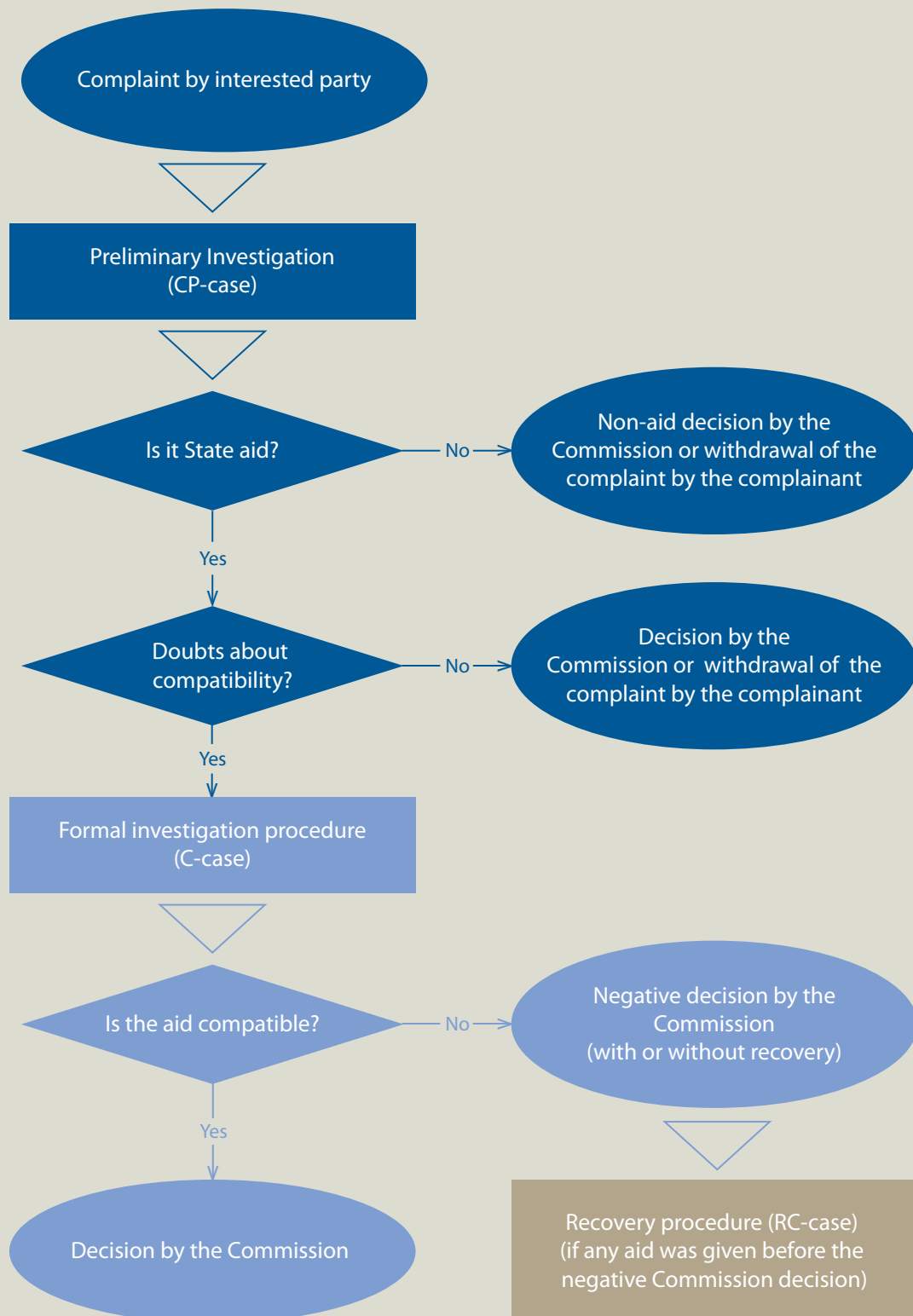


FIGURE 3

SIMPLIFIED OVERVIEW OF A COMPLAINT PROCEDURE



AUDIT SCOPE AND APPROACH

12. The overall objective was to assess whether the Commission's procedures ensure effective management of State aid control. The main audit question was broken down into the following three sub-questions:

- (a) Does the system of notifications, complaints and ex officio enquiries ensure that the Commission handles all relevant State aid cases?
- (b) Does the Commission have adequate management structures and procedures in place for effective handling of the State aid cases within the deadlines?
- (c) Does the Commission monitor the impact of its State aid control?

13. The audit focused on the organisation and the decision-making and monitoring processes of the Commission during the period 2008–10, but did not assess the validity of the decisions taken by the Commission. The audit scope covered the areas of State aid control for which Competition DG is responsible. These areas represented 96 % of all State aid granted in 2009 (excluding railways)⁹ due to the specific large volume of aid granted to the financial sector.

14. The audit work at Commission level included:

- o the examination of a sample of 50 (pre-)notifications, 30 complaints, 40 monitoring cases and 10 recovery cases;
- o interviews with case handlers and case managers of 10 different units of Competition DG, with key staff of Competition DG's horizontal units, as well as with the Commission's Legal Service and the Secretariat-General;
- o review of key management documents;
- o analytical tests.

15. Although the Court has not audited the systems at Member State level, it has carried out information visits to 44 public and private sector stakeholders in eight Member States¹⁰. The opinions of these stakeholders were only used as an additional source of information if they were shared by a large number of them.

⁹ COM(2010) 701 final.

¹⁰ Denmark, Germany, France, Italy, Cyprus, Hungary, Slovenia and the United Kingdom.

OBSERVATIONS

IDENTIFYING RELEVANT STATE AID CASES

- 16.** The Treaty obliges Member States to notify all planned State aid measures to the Commission. The Court examined whether the current system of notifications, complaints and ex officio inquiries gives sufficient assurance that the Commission deals with all important State aid cases. Paragraphs 17 to 33 examine whether the Commission does enough to verify whether Member States fulfil their obligations under the State aid rules and to raise Member States' awareness of their obligation to notify state aid.

INSUFFICIENT COMMISSION CHECKS TO ENSURE MEMBER STATES ARE COMPLYING WITH THEIR OBLIGATION TO NOTIFY STATE AID

THE COMMISSION HAS NOT MADE FULL USE OF PUBLICLY AVAILABLE INFORMATION

- 17.** The Commission does not have a specific legal basis to require Member States to provide it with information to identify the main aid-granting authorities, the internal organisation at Member State level or the applicable notification and control procedures in Member States. Neither does it have a specific legal basis to make any sector or Member State enquiries to identify potentially unlawful State aid. However, the Commission has not made full use of the information that is publicly available with a view to assessing the risk of non-notification of aid. It therefore has not identified categories of aid measures for which the risk of non-notification is particularly high either because of the inherent risk of the measures or weaknesses in the control systems put in place by the Member State.
- 18.** The risk of non-notification is particularly high for rescue and restructuring aid, tax measures and the sale of land below market price, which has led to several complaints. The risk is also higher for aid granted by regional and local government bodies, which only occasionally grant State aid and therefore have a limited knowledge of State aid rules.

MONITORING OF BLOCK-EXEMPTED MEASURES IS LIMITED

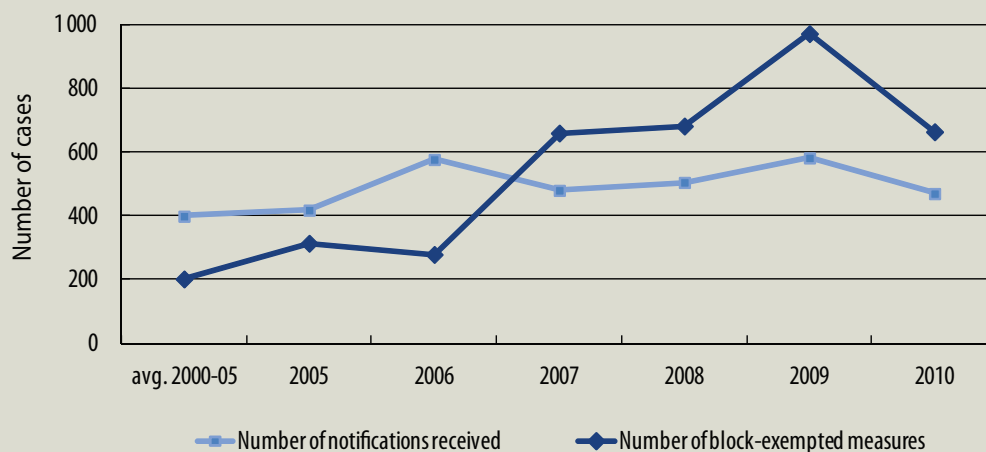
- 19.** In 1998 the Council enabled the Commission to adopt so-called Block Exemption Regulations (BERs) for State aid¹¹. With these regulations, the Commission can declare specific categories of State aid compatible with the Treaty if they fulfil certain conditions, thus exempting them from the requirement of prior notification and Commission approval.
- 20.** The Commission has introduced block exemptions in several areas, including State aid for training, employment, R & D and environmental protection. In 2008 these block exemptions were grouped in one General Block Exemption Regulation (GBER)¹². In line with the basic principles set out in the State aid Action Programme (SAAP) (see paragraph 6), the GBER significantly increased the scope of the BERs, both in terms of the types of aid and in terms of the maximum amounts involved. Since 2007, the number of block-exempted measures exceeds the number of notifications (see **Figure 4**).

¹¹ Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ L 142, 14.5.1998, p. 1).

¹² Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Article 87 and 88 of the Treaty (General block exemption Regulation) (OJ L 214, 9.8.2008, p. 3).

FIGURE 4

THE TREND IN THE NUMBER OF NOTIFICATION AND BLOCK-EXEMPTION MEASURES



Source: European Commission.

21. The Commission has recognised the increasing importance of *ex post* monitoring, as more and more measures are exempted from *ex ante* notification¹³. However, its monitoring activity is limited to a yearly desk review of 15 approved aid schemes plus 15 block-exempted measures, selected judgmentally. This can only give an impression of the respect of the conditions set by the GBER and by the Commission decisions approving aid schemes¹⁴.

22. The Commission's 2008 monitoring exercise found significant problems in 3 of the 30 cases examined. Furthermore the usefulness of this exercise was limited because the Commission was unable to check the individual grants under some of the selected schemes as no aid had yet been granted. It also had difficulties in obtaining the requested information from the Member States.

THE COMMISSION DOES NOT MONITOR WHETHER THE CEILING FOR DE MINIMIS AID IS COMPLIED WITH

23. The de minimis regulation¹⁵ has introduced a ceiling of 200 000 euro below which it is considered that aid does not affect trade between Member States or does not distort competition and is therefore not considered to constitute State aid. The Member States have welcomed and gradually increased the use of the de minimis aid rules, which allow aid measures to be implemented more quickly.

24. Member States, when granting de minimis aid, should inform the enterprise concerned of the de minimis character of the aid, request full information from the enterprise about other de minimis aid received during the last three years and carefully check that the ceiling will not be exceeded. Respect of the ceiling may also be ensured by means of a central register, but very few Member States have one.

¹³ See European Commission, Report on Competition Policy 2009 (http://ec.europa.eu/competition/publications/annual_report/2009/en.pdf).

¹⁴ As a comparison, in 2009, almost 1 000 block exemption measures were notified to the Commission *ex post* and more than 200 schemes were notified *ex ante*.

¹⁵ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Article 87 and 88 of the Treaty to de minimis aid (OJ L 379, 28.12.2006, p. 5).

- 25.** Although Member States are required to record and compile all the information regarding the application of the de minimis Regulation and to provide this information to the Commission on written request, in practice the Commission does not monitor the respect of the conditions for granting de minimis aid. Several aid-grantors declared that the respect of the ceiling of de minimis aid is very difficult to check and that they have no clear idea if the ceiling is generally respected or not.

¹⁶ When the Member State believes that a planned measure does not constitute State aid, but is not fully sure and would like the Commission to decide on it.

THE COMMISSION DOES NOT SYSTEMATICALLY TRY TO DETECT UNNOTIFIED AID MEASURES

- 26.** The detection of State aid measures that should have been notified by Member States but were not, is mainly based on complaints and ex officio enquiries (see paragraph 9). The Commission only recently started to record ex officio cases separately from complaints. The number of ex officio cases (35 in 2009 and 18 in 2010) is much smaller than the number of complaints (around 400 in 2009).
- 27.** Although some potential new State aid cases are picked up through a review of the press, resulting in ex officio cases, this has not become standard practice. Indeed, the Commission's limited monitoring of aid schemes and block exemption measures (see paragraph 19 to 22) constitutes the only systematic ex officio activity currently being undertaken in the State aid area. The Commission itself has recognised that relying on complaints and litigation at national level is insufficient to ensure that Member States fully respect their obligation to notify State aid, and that any further steps to reduce the number of notifications should be compensated by other control mechanisms.
- 28.** The complexity of the concept of State aid makes it difficult for Member States to decide whether a measure constitutes State aid and needs to be notified to the Commission. Identifying if certain tax measures are State aid or not is particularly difficult. This explains why about 5 % of the notifications are made for reasons of legal certainty only.¹⁶ As the Court of Justice of the European Union interprets the concept of State aid in a wide way, the Commission considers it has little margin to decide that a measure does not constitute State aid.

29. If the Commission decides following a complaint or an ex officio enquiry, that the measure constitutes compatible aid, the absence of notification (or late notification) has no consequences for the Member State or for the beneficiaries. If the Commission decides that incompatible aid has been granted, the beneficiaries have to reimburse the aid with interest, as if they had received a loan (see paragraph 68).
30. The Commission does not check if the aid measures for which the notification was withdrawn, but which seemed prima facie to constitute State aid, were abandoned or implemented without Commission approval. In the latter case the measure would constitute unlawful State aid, for which the Commission could open an ex officio case. Likewise for notified aid measures for which the Commission issued a negative decision.

THE COMMISSION IS NOT PROACTIVE ENOUGH IN RAISING MEMBER STATES' AWARENESS OF THEIR OBLIGATIONS TO NOTIFY STATE AID

THE NETWORK OF COUNTRY CONTACT POINTS CREATED BY THE COMMISSION MET WITH LITTLE SUCCESS

31. In 2006 Competition DG decided to create country contact points in the Commission. These officials (one for each country) are the first 'entry point' into Competition DG. Their task is limited to providing informal, non-binding practical guidance to Member States outside the context of pending cases. However, most Member States' aid-granting authorities have never contacted their country contact point, either because they were not aware of their existence or because they did not feel the need.

MOST STAKEHOLDERS WOULD WELCOME A MORE PROACTIVE ROLE OF THE COMMISSION

32. Stakeholders in seven of the eight Member States visited stated that they would welcome a more proactive role of the Commission in one or more of the following areas, which warrant further consideration by the Commission:

- Awareness-raising among potential aid-grantors about the notification duty.
- The promotion of best practices about the design of effective aid measures that are compliant with EU competition rules.
- More guidance about exactly which information needs to be provided for different types of notification in order to allow the Commission to conclude that the notification is complete. The standardisation of the notification form in the electronic SANI system has only partly solved this problem.
- The publication of a separate, regularly updated frequently asked questions (FAQ) section on the competition website of the European Commission.
- A helpdesk function to provide information about the interpretation of guidelines.

ACCORDING TO SOME STAKEHOLDERS, THE COMMISSION'S GUIDELINES ARE TOO COMPLICATED

33. The Commission guidelines are generally welcomed by the stakeholders. Whilst these guidelines have increased the predictability of the Commission's State aid decisions, some stakeholders consider them too complicated, insufficiently clear and leaving too much room for interpretation, causing legal uncertainty.

CASE HANDLING

- 34.** The Procedural Regulation, the Best Practice Code (see **Box 1**) and Competition DG's internal Manual of Procedures set the rules governing the handling of notifications, complaints and recovery cases. The Court examined whether the Commission has adequate management structures and procedures for effective handling of the State aid cases within the deadlines.

BOX 1

KEY FEATURES OF THE BEST PRACTICE CODE ADOPTED IN 2009

- In cases which are particularly novel, technically complex, sensitive, or urgent, the Commission will offer mutually agreed planning to the notifying Member State.
- The Commission will endeavour to group requests for information during the preliminary examination phase. In principle, there will therefore only be one comprehensive information request, normally to be sent within 4–6 weeks after the date of notification.
- Publication of the decision to open the formal investigation procedure within two months.
- Stricter enforcement of the time limits given to Member States and to interested parties to submit comments.
- The Commission will use its best endeavours to investigate a complaint within an indicative time frame of 12 months from its receipt.
- Member States and the complainants will systematically be kept informed of the closure or other processing of a complaint.

THE COMMISSION IS HAMPERED BY A LACK OF RELIABLE MANAGEMENT INFORMATION AND ORGANISATIONAL PROBLEMS

COMPETITION DG'S STATE AID PROCEDURES ARE GENERALLY CLEAR AND WELL RESPECTED

- 35.** The Manual of Procedures is the main reference document on case-handling procedures and is available on Competition DG's intranet. It is regularly updated and staff are informed about the updates by e-mails. It covers most of the main activities, providing clear guidance as well as standard templates. The manual is generally well respected by the case handlers, with few exceptions concerning the respect of procedural deadlines (see paragraph 48) and the uploading of documents in ISIS (see paragraph 41).

THE NUMBER, COMPLEXITY AND PRIORITISATION OF CASES POSE PROBLEMS

- 36.** State aid cases require careful and detailed analysis of aid proposals which can be complicated and of considerable economic significance. In some cases they can involve matters as complex as large aeronautics projects or bank restructuring. On average, each officer acts as case handler for seven cases and as case assistant for seven others. The resources available for other activities such as ex officio enquiries, monitoring activities, initiatives to increase best-practice sharing among the Member States, etc. are consequently limited.
- 37.** One of the goals of a reorganisation of Competition DG in 2007 was to increase the DG's ability to make more efficient use of its resources through a more flexible allocation of human resources between units and directorates, making it possible to include in the case team a case handler or case assistant from a different unit. However, except during the initial stages of the financial crisis, the time spent by case handlers on cases managed by other units has remained limited to a few percent of their total working time.

38. Since December 2009 new State aid cases are divided into two priority categories on the basis of two main criteria, precedent value and enforcement priority:

- o Priority 1 cases are those regarded as essential to ensure effective State aid control;
- o Priority 2 cases are all the cases which are not priority 1.

39. Although the priority 1 cases get more resources and more management attention, they do not necessarily get solved quickly as they are likely to be the most complex cases. As the case handlers work on several cases simultaneously and have to respect legal deadlines for all notifications, they sometimes have to put aside a priority 1 case to work on a lower priority notification instead. Case handlers consider that they need further guidance on allocating their working time between the priority 2 cases which represent the majority of the workload¹⁷.

40. In order to ensure an optimal allocation of resources, the management needs accurate information on the resources available and the workload on hand throughout the organisation. In 2009 Competition DG has accordingly introduced a time reporting pilot project, called PETRA. This tool allows case handlers to book their working time to the different cases they work on. Participation is voluntary and partial, which means that at present, the reports based on PETRA are only indicative and Competition DG still has no tool showing the full picture.

¹⁷ According to Competition DG indicators for State aid, less than 6 % of the new State aid cases in Q2 2010 are Priority 1 whereas 82 % are Priority 2.

IN GENERAL THE CASE-HANDLING IT-SYSTEMS MEET USER REQUIREMENTS

- 41.** ISIS is used to manage and monitor all State aid cases. It is a useful tool for storing the information needed for the decision-making purposes, as well as for monitoring deadlines and planning the work. A number of reports can be produced from the system, for example a backlog of cases, statistics on duration, etc. However, there are some weaknesses:
- o Until November 2010, the investigation of one notification or complaint was often split into several procedures (see **Figures 2** and **3**), each with a different identification number, making it impossible to assess the total duration of handling a notification or a complaint.
 - o The associated procedures were not always clearly indicated in ISIS making it time-consuming and difficult to get a clear overview of the complete case.
 - o In addition, for 30 % of the cases reviewed by the Court, some documents, such as minutes of meetings, e-mails, records of phone calls or conference calls, were missing from ISIS and/or they had not been registered in a timely manner.

NEW PROCEDURES FOR MANAGING NOTIFICATIONS HAVE NOT RESOLVED THE PROBLEM OF TIMELINESS AND CUMBERSOMENESS

- 42.** In 2009, the Commission issued a 'Simplification Package', consisting of a Simplified Procedure¹⁸ (see paragraphs 59 to 60) and Best Practice Code (BPC) (see paragraph 34 and **Box 1**) for the conduct of State aid control procedures. The main objective of the BPC was 'to provide guidance on the day-to-day conduct of State aid procedures, thereby fostering a spirit of better cooperation and mutual understanding between the Commission, Member State authorities and the legal and business community.'

¹⁸ Notice from the Commission on a simplified procedure for treatment of certain types of State Aid (OJ C 136, 16.6.2009, p. 3).

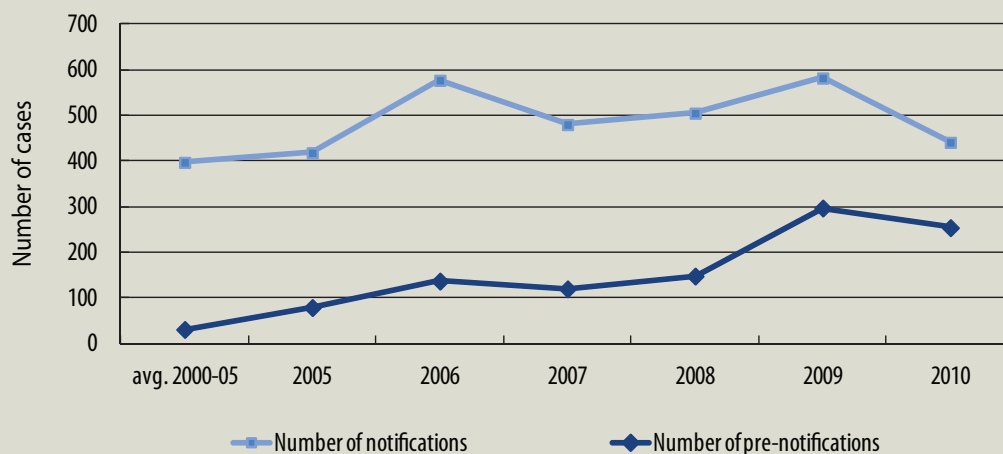
43. As foreseen in the BPC, the Commission has also encouraged Member States to enter as early as possible into pre-notification contacts outside the Simplified Procedure. Pre-notification contacts aim to improve the quality of the notifications by clarifying the remaining questions or the information which the Commission needs to take a decision. Even if some aid grantors question its usefulness, the number of pre-notification cases has increased considerably in 2009–10 (see **Figure 5**).

THE PRELIMINARY INVESTIGATION OF MANY NOTIFICATIONS TAKES A LONG TIME

44. The information provided by the Member State in the notification should be sufficiently exhaustive to enable the Commission to decide without the need for further information. If the notification is incomplete, Competition DG sends a request for complementary information, asking the Member State to reply within 20 working days. The Member State has the right to ask for an extension of this time limit.

FIGURE 5

THE TREND IN THE NUMBER OF PRE-NOTIFICATIONS AND NOTIFICATIONS



Source: European Commission.

- 45.** The average time to take a decision increased between 2005 and 2008.¹⁹ In 2007–08, for 40 % of the notifications it took six or more months to make a decision. This percentage dropped significantly in 2009, but this is partly explained by the financial crisis cases which have been handled particularly fast due to their urgent nature.
- 46.** The duration of the preliminary investigation is mainly determined by three elements:
- the number of requests for information (REQ) sent by the Commission to the Member State;
 - the time taken by the Member State to reply to the REQ;
 - the time taken by the Commission to either take a decision or send another REQ (maximum two months).

For one third of the notifications in the sample the Commission sends two or more requests for information

- 47.** As stated in the Manual of Procedures, the case team should endeavour to group requests for information during the preliminary investigation phase. In principle, there should be only one comprehensive information request during the preliminary investigation phase, normally to be sent within 4–6 weeks after the date of notification. One further request can be made in exceptional, duly justified cases. However, in 28 % of the cases sampled where the Commission has formally asked for further information, three or more REQs were sent.

Requests for information are often sent close to the legal deadline

- 48.** The REQs were sent by the Commission on average 50 days following the notification or the latest submission of information from the Member State. As many REQs need to be translated and case handlers are managing the deadlines of several cases simultaneously, some REQs are only sent just before the 2-month deadline expires. In 4 of the 43 notified cases reviewed, the legal two-month deadline for the Commission to send a request for information or to make a decision (either to approve the aid or to launch a formal investigation) has been exceeded.

¹⁹ Source: Competition DG, State aid indicators, section IV.10.b. Competition DG's timeliness indicators reports the duration between the opening and the closure of decided cases by year of opening and are therefore overly flattering for recent years as still undecided cases, which have by definition long durations, are excluded.

Member States frequently do not reply within the deadline set by the Commission

- 49.** The large volume and the complexity and detail of the questions sent by the Commission make it challenging for the Member State to reply within 20 working days. The administrative structure of a Member State can also cause further delays in replying to the Commission. For example, those with a decentralised administration have a reporting structure which involves several levels of authority through which the replies must be channelled.
- 50.** Based on the sample of notifications reviewed by the Court, the average time taken for the Member State to provide the information was 33 working days. For 40 % of the notified cases in the sample, the Member States did not provide the requested information on time, neither within the 20 working days nor within the revised timetable agreed with the Commission.

THE FORMAL INVESTIGATION PROCEDURE IS ALSO LENGTHY

- 51.** The Commission is obliged to open a formal investigation procedure whenever it has serious difficulties or doubts in determining the compatibility of the aid with the internal market and/or difficulties of a procedural nature in obtaining the necessary information. For more than half of the cases notified in 2005–08 it took more than six months to take a decision to open a formal procedure²⁰.
- 52.** The Commission should as far as possible endeavour to adopt a decision for notified cases within 18 months from the opening of the formal investigation procedure²¹. The number of cases exceeding the recommended duration of 18 months is 38 % (9/24) for formal investigation procedures launched in 2005, 13 % (4/31) in 2006, 33 % (9/27) in 2007 and 18 % (3/17) in 2008. When also taking into account the preliminary investigation, the total duration between the notification and the Commission decision in these cases exceeded 2 years.

²⁰ Concerning the years 2008 and 2009 the figures are inconclusive as there are still several undecided cases.

²¹ Article 7(6) of the Procedural Regulation

- 53.** Stakeholders in all Member States visited said that the case handling procedures take too long. Most problematic are individual aid projects, especially those which the Commission submits to an in-depth economic assessment (see paragraphs 55 to 56). This can have negative effects for the Member States such as delaying national legislation or the risk of losing potential investors. There are often changes in the composition of the Commission case teams which may further delay procedures.

THE USE OF MUTUALLY AGREED PLANNING HAS BEEN LIMITED SO FAR

- 54.** In September 2009, the Best Practices Code introduced Mutually Agreed Planning (MAP). The Member State and the Commission can mutually agree on the priority treatment of the case, on the information to be provided by the Member State, on the likely form and the duration of the assessment made by the Commission. In return for the Member State's efforts in providing all the necessary information in a timely manner, the Commission will endeavour to respect the mutually agreed time frame when investigating the case. No indications of MAP were found for any of the cases reviewed during the audit.

THE NEW REFINED ECONOMIC APPROACH IS INSUFFICIENTLY CLEAR TO THE STAKEHOLDERS

- 55.** The new architecture set out in the 2005 SAAP (see paragraph 6) is based on a '3-stream system': block exemption, standard assessment and detailed assessment. In principle, State aid measures notified to the Commission are to be scrutinised applying a standard assessment. Detailed assessment applies to a small number of specific cases (e.g. certain large investment projects).

- 56.** Such detailed assessment may include a refined economic analysis²², designed to provide the Commission with a robust analysis of the likely economic impact of a State aid. This focuses on a 'balancing test'. 'The assessment of the compatibility of an aid is fundamentally about balancing its negative effects with its positive effects in terms of a contribution to the achievement of well-defined objectives of common interest.'²³
- 57.** These new arrangements have, however, raised concerns among stakeholders, who have varied views on the effectiveness of the Commission's refined economic approach. Some believed that it only prolongs the approval procedure and creates more uncertainty, whilst others found it a positive way to examine the real impact of the proposed measure and were disappointed that the Commission did not use it more.
- 58.** The Commission carried out a public consultation on this issue in 2009 and published the results of this exercise in early 2011. However, the Commission has not yet responded to the concerns about the refined economic approach expressed in this consultation. Successful operation of the state aid regime requires a high degree of mutual understanding between the Commission and stakeholders in Member States.

THE SIMPLIFIED PROCEDURE INTRODUCED IN 2009 WAS LITTLE USED SO FAR

- 59.** A Simplified Procedure (SP) was introduced 'to examine within an accelerated timeframe certain types of State support measures which only require the Commission to verify that the measure is in accordance with existing rules and practices without exercising any discretionary powers'. This may prove to be a useful initiative but it is difficult to judge its effectiveness as it has been little used so far.

²² The staff working paper 'Common principles for an economic assessment of the compatibility of State aid under Article 87.3 EC-Treaty', 6 May 2009 explains the methodology used by the Commission in examining cases submitted to a refined economic analysis (http://ec.europa.eu/competition/state_aid/reform/reform.html).

²³ Paragraph 9 of the Common principles for an economic assessment of the compatibility of State aid under Article 87.3 EC-Treaty.

- 60.** In 2010, the SP was used for 21 cases. This is less than 4 % of the total number of notifications received. Its limited use can be ascribed to the following factors:
- The Commission reserves the right to revert to the normal procedure if one of the safeguards/exclusions foreseen in the Notice on Simplified Procedure applies;
 - Member States are reluctant to use SP because, unlike for normal notifications, a summary of the notification is published on the Commission website, which gives the possibility for interested parties to submit observations;
 - The strict conditions for application of the SP;
 - The SP only applies to straightforward notified cases, which are usually approved within six months in the normal procedure anyway;
 - The SP must be preceded by compulsory pre-notification (PN) contacts.

COMPLAINTS CONTINUE TO TAKE A LONG TIME TO RESOLVE AND THE PROCEDURE IS NOT TRANSPARENT

- 61.** Competitors or other interested parties who believe that a certain measure constitutes State aid can complain to the Commission. A complaint form is available on the European Commission's website and can either be filled in online or sent by post, making it relatively easy to lodge a complaint. Several complaints fall outside the remit of Competition DG's competence and are either closed after a limited examination of the complaint or transferred to another DG such as Taxation and Customs Union DG. Some complaints received and handled by Competition DG are not motivated by concerns about potential distortion of competition, but by e.g. environmental concerns.

- 62.** Both the number of complaints received and the stock of pending complaints have risen steadily during the period 2006–10 (see **Figure 6**). Half were pending for more than one year²⁴, almost a quarter for more than two years and a few even for more than five years. The backlog is particularly important in the area of transport. These cases were taken over by Competition DG from Energy and Transport DG in early 2010 following the reorganisation of the Commissioners' portfolios.
- 63.** There are no legally binding deadlines for complaint handling whereas for notifications strict deadlines apply. Nevertheless, Article 10 of the Procedural Regulation obliges the Commission to examine the complaints 'without delay'.
- 64.** Non-priority complaints are often dealt with at times when the responsible case handler does not have more urgent work. As a result, both the preliminary and the formal investigation can take a long time. Ten cases²⁵ out of the 30 complaints reviewed by the Court were not decided or closed within two years. In several cases no action was taken for more than a year. Half of all CP cases are not decided within one year²⁶ and the majority of formal investigation procedures also take more than one year. Complainants have the possibility to bring the case to the Court of Justice of the European Union for failure to act (Article 265 TFEU), but only in a few cases have they done so.

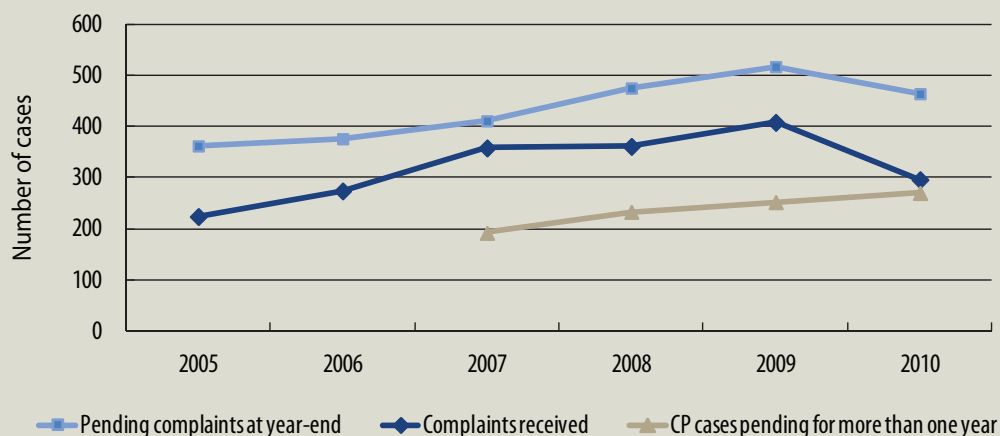
²⁴ Compared to 192 on 1.1.2008, 233 on 1.1.2009 and 270 on 30.10.2010, showing a continuous increase.

²⁵ This number can still increase as some cases are still pending.

²⁶ Source: Commission Indicators for State aid. These statistics actually underestimate the time needed to examine a complaint, as some CP cases are closed either by transferring the case to another DG or by opening a formal investigation procedure. In both scenarios the closure of the CP case is not the end of the procedure from the point of view of the complainant.

FIGURE 6

INCREASING NUMBER OF COMPLAINTS



Source: European Commission.

- 65.** In six cases in the Court's sample of 30 complaints, the Commission did not forward the complaint within two months to the Member State with a request for information. In 11 cases, the Member State and/or the complainant were not informed about the progress of the case for more than one year. In six cases the Member State and/or the complainant was not informed about the closure of the case, causing legal uncertainty as Member States do not know if they are allowed to continue granting the aid or not.
- 66.** The late opening or lack of opening of the formal investigation procedure also reduces the transparency of the procedure as third parties are only informed about the case and get the opportunity to comment after the publication in the Official Journal of the decision to open a formal investigation procedure (two to six months after the decision has been taken). Publication is often delayed by the requirement to translate the decision in all official EU languages and by the need to produce a non-confidential version of the decision.
- 67.** The Commission tries to close unfounded complaint cases without an official Commission decision taken by the College. If the Commission is of the opinion that there are insufficient elements to support the existence of unlawful aid, a letter is sent to the complainant. The complainant may on that basis decide not to pursue his complaint, which will then be deemed to have been withdrawn. Only for a minority of complaints has such a letter been sent within 12 months after the complaint was lodged.

ENFORCEMENT OF RECOVERY DECISIONS

- 68.** Recovery of unlawful State aid has not been conceived as penalty, but as a means to restore the situation previous to the granting of the illegal and unlawful aid'.²⁷ This objective is obtained once the aid (plus interest) is repaid by the recipient who enjoyed an advantage over its competitors on the market. The Member State must take all necessary measures to recover the aid from the beneficiary in accordance with its national procedures.

²⁷ COM(2010) 282 final of 3 June 2010 — Report from the Commission — Report on Competition Policy 2009, SEC(2010) 666.

69. Effective enforcement of State aid recovery decisions is essential for the credibility of the Commission's State aid policy, and it is considered as a priority under the State Aid Action Plan (SAAP) (see paragraph 6).

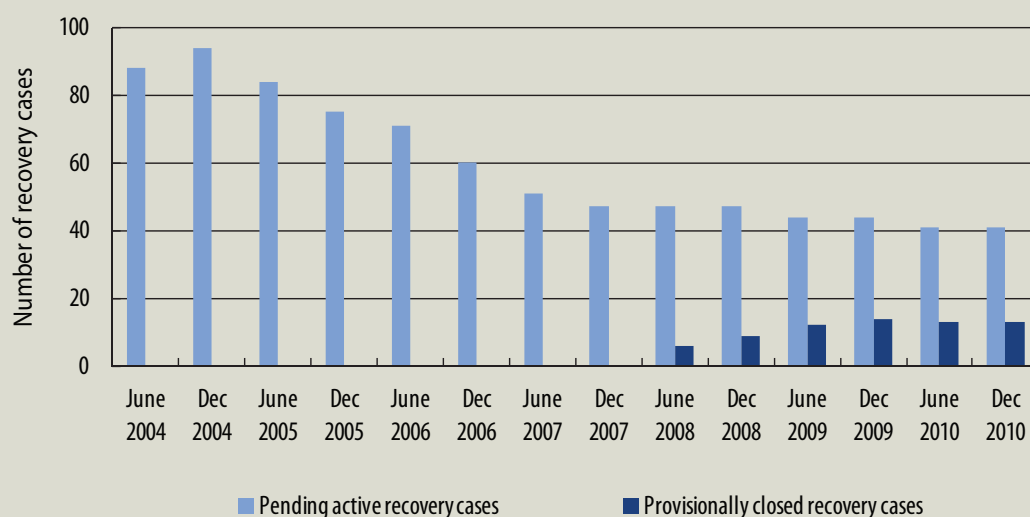
THE COMMISSION HAS HALVED THE NUMBER OF ACTIVE PENDING RECOVERY CASES SINCE 2005

70. Since 2003, recovery decisions have been followed up by a specialised team. The Commission managed to reduce the number of active pending recovery cases from a high of 94 at the end of 2005 to 41 at the end of 2010 (see **Figure 7**).
71. The number of pending recovery cases continued its downward trend in 2008–10, albeit at a slower pace. This is due to the 'provisional closure' of 13 recovery cases²⁸.

²⁸ Since July 2008, the Commission provisionally closes 'recovery cases for which the Member State has adopted all the necessary measures available in its national system, but recovery cannot be considered as fully executed. Provisionally closed recovery cases can be reopened, in particular when the judgment on which the provisional closure was based is overruled.

FIGURE 7

THE TREND IN THE NUMBER OF PENDING RECOVERY CASES



Source: European Commission.

ENFORCEMENT OF MANY RECOVERY DECISIONS TAKES TOO LONG

- 72.** Few Commission recovery decisions are executed within the four months deadline set by the Commission. Most recovery decisions are referred to the Court of Justice either by the Member State and/or the beneficiary (action for annulment) and/or by the Commission (action for non-compliance with Commission decision). Since 2005, the Commission has filed a Court action against several Member States which failed to implement a recovery decision. Since 2009, the Commission has also launched six infringement procedures²⁹ against Member States who have not taken the necessary measures to comply with the judgment of the Court of Justice, asking it to impose a fine or penalty.
- 73.** Some old recovery cases are pending for 10 to 20 years because of the lengthy procedures before both national courts (Member State versus beneficiary) and Court of Justice of the European Union (Commission versus Member State). The average age of the 41 pending recovery cases in July 2010 was almost five years. Fourteen of them are pending for 10 or more years. Several other provisionally closed cases are also more than 10 years old. The Commission's enforcement objective, to close or bring to Court the recovery cases within two years, was met in 2008–10 in only about half of the cases. The trend has improved during this period (from 28 % in the first half of 2008 to 57 % in the second half of 2010).
- 74.** Another reason for the lengthy recovery procedures is the difficulty to identify all beneficiaries of aid schemes and the exact amount of the aid to be recovered. The Commission is not legally required to fix the exact amount to be recovered, but usually specifies the method to be used by Member States to calculate the amounts to be recovered. Some Member States would welcome more help from the Commission in establishing the amount to be recovered.

²⁹ Some of those procedures include more than one Court case.

PROMPT REACTION BY THE COMMISSION TO THE FINANCIAL CRISIS

THE APPROVAL PROCEDURE WAS RAPID

- 75.** Urgent crisis cases have been handled much faster than non-crisis cases by relying on less formal correspondence with the Member States and more informal exchange of information by phone calls and e-mails. Many Member States also accepted to receive correspondence and decisions in English (language waiver) in order to speed up the procedure and beneficiaries were involved more closely in the procedure. Several cases were solved within days.
- 76.** While the additional workload was initially absorbed through overtime, Competition DG managed to more than double the number of case handlers dealing with aid to the financial sector in 2009 by creating a Financial Crisis Task Force.

THE COMMISSION ISSUED SPECIFIC GUIDANCE FOR CRISIS-RELATED AID MEASURES

- 77.** In response to the urgency of the situation, the Commission quickly adopted specific guidance on State aid to the financial sector³⁰, complementing the existing Rescue and Restructuring Guidelines³¹. This guidance was welcomed by Member States, but there was also some criticism concerning the room for interpretation of certain conditions.
- 78.** The Commission's rapid response and pragmatic attitude contributed to avoiding the bankruptcy of any major financial institution headquartered in the EU. The system of provisional approval of the aid for a period of six months, made it possible to give aid quickly and legally, retaining the possibility to examine the case in more detail later.

³⁰ Communications 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 (OJ C 270, 25.10.2008, p. 8);

The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition (OJ C 10, 15.1.2009, p. 2); The treatment of impaired asset in the Community banking sector (OJ C 72, 26.3.2009, p. 1); The return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules (OJ C 195, 19.8.2009, p. 9).

³¹ Communication from the Commission — Community Guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

THE COMMISSION SOUGHT TO PRESERVE A LEVEL PLAYING FIELD

- 79.** To prevent financial institutions from using the aid to strengthen their market position to the detriment of competitors, the Commission had to look into the conditions under which the aid was provided to the banks. In certain cases, this led to the divestment of certain activities and/or ending certain practices (for instance a price-leadership ban). Member States and aid beneficiaries are required to submit periodic (mostly quarterly or biannual) implementation reports.
- 80.** Competition DG's Financial Crisis Task Force closely follows up the decisions in the main rescue and restructuring cases of financial institutions. In some of these cases, slow or inadequate implementation of the conditions or the commitments given was noted, but these anomalies were brought to the attention of the Member State concerned and followed up by Competition DG's services.

THE UPTAKE OF THE TEMPORARY FRAMEWORK INTENDED TO FACILITATE AID TO THE REAL ECONOMY WAS LIMITED

- 81.** As part of the European Economic Recovery Plan, on 19 January 2009 the Commission approved a Temporary Framework (TF)³² (see **Box 2**) to give Member States additional possibilities to address the effects of the credit squeeze on the real economy and to maintain continuity in the companies' access to finance. With the exception of the possibility to grant limited amounts of up to 500 000 euro as compatible aid³³, which was welcomed by most Member States, and aid in the form of guarantees, the uptake of the TF was limited.

³² Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 83, 7.4.2009, p. 1); as further amended by (OJ C 261, 31.10.2009, p. 2), and (OJ C 303, 15.12.2009, p. 6).

³³ Which is not included in the statistics as de minimis aid is considered not to be aid according to the definition of Article 107(1) TFEU.

- 82.** Most possibilities provided by the TF were only used by a minority of Member States and moreover Member States granted in 2009 only 2,7 % of the approved volume of the TF schemes. One of the reasons was that the duration of the TF was too short (less than two years, until the end of December 2010) to allow Member States to elaborate, approve and implement aid measures under the TF.
- 83.** On 1 December 2010, the Commission prolonged the TF until 31 December 2011, but with stricter conditions and a gradual phasing-out. Since 1 January 2011, every bank requiring State support (in the form of capital or impaired asset measures) has to submit a restructuring plan to the Commission.

BOX 2**THE TEMPORARY FRAMEWORK**

As announced in its European Economic Recovery Plan, the Commission introduced a number of temporary measures to allow Member States to address the exceptional difficulties of companies to obtain finance. The TF allows Member States to grant, under certain conditions and until the end of 2010:

- (a) Grants of limited amounts of up to 500 000 euro per company over a period of three years;
- (b) State guarantees for loans at a reduced premium;
- (c) Subsidised loans, in particular for the production of green products;
- (d) Risk capital aid to 2,5 million euro per SME per year.

MONITORING BY THE COMMISSION

- 84.** The Commission publishes each year a State aid Scoreboard assessing the progress made towards reaching the Lisbon objectives of less and more targeted State aid and also assesses the impact of its State aid control on an ad hoc basis. Paragraphs 85 to 95 assess whether the data collected by the Commission is reliable and exhaustive, as well as whether the impact assessment carried out by the Commission is sufficient.

³⁴ Set by the Implementing Regulation No 794/2004.

THE STATE AID DATA PROVIDED BY THE MEMBER STATES IS INCOMPLETE AND INSUFFICIENTLY RELIABLE

THERE ARE PROBLEMS IN OBTAINING STATE AID DATA FROM MEMBER STATES

- 85.** In the first quarter of the year, the Commission sends a spreadsheet to the Member States, for completion with the figures of the actual State aid expenditure for each of the listed measures granted during the previous year. The data received from the Member States are of varying quality and the Scoreboard team (see paragraph 90) spends a lot of time checking the data and adding missing amounts. Most stakeholders consider the current Scoreboard procedure as very resource-intensive.
- 86.** Several stakeholders reported problems in obtaining data from regional and local public authorities, as in most Member States the State aid coordination body in the national or federal Ministry does not have any control or supervisory authority over regional or local governments. As a result, the State aid data provided by the Member States and used by the Commission is likely to be incomplete, but the Commission's State aid Scoreboard does not contain any reservations.
- 87.** Many Member States are late in providing the data, but only one infringement procedure has been launched for not respecting the deadline so far³⁴. One of the main problems is that the central State aid coordination unit (if any) does not have an efficient centralised system making it possible to directly produce the data requested by the Commission, but has to obtain it from a large number of aid-granting authorities.

SEVERAL TYPES OF AID ARE EXCLUDED FROM THE STATE AID STATISTICS

- 88.** The Scoreboard covers State aid as defined under Article 107(1) TFEU granted by Member States during the reported year (see paragraphs 3 to 4). This definition is narrower than the definition used by most Member States in their national reports.
- 89.** Aid to the railways sector is excluded, even though more and more national railway markets have been opened up to competition. As one of the most important aid-receiving sectors is excluded, the State aid data provided to and published by the Commission cannot be considered complete. The Autumn 2010 State Aid Scoreboard for the first time mentions that aid to railways is reported by Member States to amount to 33,1 billion euro or 0,3 % of EU-27 GDP in 2009, but it does not include aid to railways in its totals for lack of comparable data³⁵.

³⁵ COM(2010) 701 final.

THE CALCULATION METHOD FOR SOME TYPES OF AID IS QUESTIONABLE

- 90.** After having received the spreadsheets completed by the Member States, the Scoreboard team of Competition DG carries out a series of checks to detect potential anomalies, including a comparison of the data provided by the Member States with the approved budget and previous years' amounts.
- 91.** However, Member States encounter difficulties in providing the Commission with reliable budget estimates in the SANI notification. In many cases it is unknown how successful the measure will be. Some aid-grantors systematically input the expected expenditure for the first year only, instead of the budget for the entire period as requested by the Commission.
- 92.** The method used by the Commission to calculate the value of some types of aid, in particular aid to the financial sector, is somewhat arbitrary. For tax measures, Member States often provide budget estimates as it is not feasible to calculate the real amount because of the complexity of the legal framework and the large number of beneficiaries.

SOME CHANGES IN THE DEFINITION OF STATE AID HAMPER THE COMPARABILITY OF THE STATISTICS OVER TIME

- 93.** The comparability of the data between different years suffers from changes in the legislation and in the presentation of the figures. For example, the growing importance of and the increases in the ceiling³⁶ for de minimis aid, introduced a downward bias in the evolution of the State aid figures reported by Member States, making comparison between successive years more difficult.

THE NUMBER OF EX ANTE EVALUATIONS HAS BEEN LIMITED AND THE COMMISSION DOES NOT HAVE AN EX POST EVALUATION FUNCTION

- 94.** The Commission's guidelines require an *ex ante* impact assessment 'for the most important Commission initiatives and those which will have the most far-reaching impacts'. By the end of 2010, a number were in the pipeline and two had been finalised³⁷.
- 95.** An Evaluation Unit was created as part of the 2007 reorganisation of Competition DG but dissolved one year later without having done any significant work in the domain of State aid. In 2010 Competition DG launched a project to develop an '*ex post* assessment' function to evaluate the actual impact of Competition DG's existing policies in the relevant markets and to learn from past experiences. By the end of 2010 the *ex post* assessment function was not yet operational.

³⁶ Initially set at 100 000 euro Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid (OJ L 10,13.1.2001, p. 30), increased to 200 000 euro as from 2007 (by Commission Regulation (EC) No 1998/2006, see above). De minimis aid is considered not to constitute State aid and most Member States do not collect any data on it.

³⁷ Commission staff working document — Impact assessment accompanying the Communication from the Commission on the application of State aid rules to public service broadcasting, SEC(2009) 893 and Summary SEC(2009) 892.

CONCLUSIONS AND RECOMMENDATIONS

THE COMMISSION HAS INSUFFICIENT ASSURANCE THAT IT DEALS WITH ALL RELEVANT STATE AID CASES

- 96.** Most Member States' systems do not provide sufficient assurance that the duty to notify State aid is respected. Although the Commission has taken some steps to enhance the cooperation with Member States regarding their notification obligation, these have not been sufficient. There are some occasional ex officio enquiries, but the Commission does not do enough to detect cases that should have been notified, mainly relying on complaints by third parties. Legally it cannot systematically review Member States' procedures to ensure their reliability and its monitoring activities are limited. As a result, there is a risk of State aid going undetected.

RECOMMENDATION 1

The Commission should review the allocation and use of the resources devoted to its management of State aid, with a view to:

- (a) adopting a more proactive stance in its relationship with Member States and making more efforts to raise awareness about State aid rules by spreading best practices and giving more practical guidance;
- (b) stepping up its monitoring activities, both in terms of sample size and of scope;
- (c) organising its ex officio enquiries in a more systematic and targeted way to detect illegal aid.

STATE AID PROCEDURES, IN PARTICULAR FOR COMPLAINTS, STILL TAKE A LONG TIME AND LACK TRANSPARENCY

- 97.** Although many of the operational elements of the case handling are well managed and the financial crisis cases were handled quickly, the approval procedure for many notified State aid measures remains lengthy. Complaint handling is particularly problematic. The combination of an increasing number of complaints, lengthy procedures and the low priority given to many complaints, has led to a growing backlog.

- 98.** The long duration of the Commission's investigation procedures and the lack of information given to stakeholders about the progress during the course of the procedure lead to legal uncertainty.

RECOMMENDATION 2

- (a) With a view to increasing transparency and speeding up the decision process, the Commission should make a binding commitment to close the preliminary investigation by either taking a decision or opening a formal investigation procedure within one year after having received the initial notification.
- (b) The Commission should minimise the number of Requests for Information sent to Member States and limit them to those strictly needed for its decision-making.
- (c) In order to provide more legal certainty to all stakeholders, the Commission should deal swiftly with unfounded complaints.
- (d) The Commission should periodically inform the complainant, the Member State and the beneficiary about the progress (or lack of progress) of each case and about the outcome of the investigation.
- (e) The Commission should consider whether there are any lessons it could learn from its handling of the financial crisis to improve its normal working methods.
- (f) The Commission should implement an enhanced system of time recording and management reporting to effectively monitor the time spent on each of the cases and the workload of each case handler so as to optimise the use of resources.

THE COMMISSION DOES NOT ASSESS THE EX POST IMPACT OF ITS STATE AID CONTROL IN A COMPREHENSIVE WAY

- 99.** The Commission's attempts to monitor State aid control are hampered by unreliable data. Its main reporting tool, the bi-annual State aid Scoreboard, has several shortcomings: lack of completeness, insufficient reliability and comparability, as well as late availability of the data.
- 100.** In addition, except for a few ad hoc studies, the Commission has not yet assessed the *ex post* impact of its State aid control activities on Europe's economy.

RECOMMENDATION 3

- (a) The Commission should improve the efficiency and reliability of its data gathering process.
- (b) The Commission should regularly assess the *ex post* impact of State aid and of State aid control on companies, markets and the overall economy.

This Report was adopted by Chamber IV, headed by Mr Igors LUDBORŽS, Member of the Court of Auditors, in Luxembourg at its meeting of 25 October 2011.

For the Court of Auditors



Vítor Manuel da SILVA CALDEIRA
President

KEY RULES GOVERNING THE COMMISSION'S STATE AID CONTROL

ARTICLE 107 TFEU (EX ARTICLE 87 TEC)

- 1.** Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

- 2.** The following shall be compatible with the internal market:
 - (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
 - (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
 - (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

- 3.** The following may be considered to be compatible with the internal market:
 - (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;
 - (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

- (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
- (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

ARTICLE 108 TFEU (EX ARTICLE 88 TEC)

- 1.** The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.

- 2.** If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.

On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

- 3.** The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

- 4.** The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article.

REPLY OF THE COMMISSION

EXECUTIVE SUMMARY

I.

The Commission recalls the important role of Member States and the Treaty obligation which is incumbent on them to notify planned State aid measures. As already clarified in the 2005 State Aid Action Plan¹, better governance is a responsibility shared with Member States (see section III-1, paragraphs 48 and following). Any improvements in the State aid control process will depend on good cooperation with the Member States.

III. first indent

The Commission actively addresses potentially unlawful aid through a combination of following up on complaints, *ex officio* cases and *ex post* control. A vigorous recovery policy acts as a further deterrent against unlawful aid.

However, enforcing the legality of aid (i.e. observing the standstill and notification obligation) is mainly the responsibility of national courts.

III. second indent

The Commission cannot improve State aid rules and practice without the effective involvement of Member States.

The Commission recognises that the duration of State aid cases may sometimes take a long time. The 2008 general block exemption regulation, which entails a move away from notifications-based *ex ante* control, already considerably reduced the administrative burden. In 2009, the Commission also adopted a simplification package for State aid with a Best Practice Code and a Simplified Procedure Notice. Both aim at improving the effectiveness, transparency and predictability of State aid procedures.

¹ State aid action plan — Less and better targeted State aid: a roadmap for State aid reform 2005–09 (COM(2005) 107 final).

REPLY OF THE COMMISSION

III. third indent

Evolving case law has tightened the conditions in which the Commission can close complaints. The very large number of complaints, the limited information provided in many complaint submissions and the legal requirement to take decisions leads to long delays in some cases. Here, too, the Commission is reliant on good cooperation with Member States in order to provide information.

The Best Practice Code has increased transparency and predictability in the complaints handling process.

III. fourth indent

The Commission welcomes the finding from European Court of Auditors regarding the Commission's prompt reaction to the financial crisis.

III. fifth indent

The impact of the Commission's State aid control can only be assessed in the light of the Treaty provisions on compatibility, but not as regards the overall 'positive' impact of State aid on the European economy and consumer welfare, which — given the state of the science of economics — would be fraught with major methodological difficulties in any event.

The actions of the European Commission in the field of State aid control in the economic and financial crisis have been the subject of an extensive review by both the European Commission and Copenhagen Economics, which has been submitted to the European Parliament.

IV. first indent

The Commission welcomes and supports the recommendation to increase advocacy, monitoring activities and ex officio inquiries.

The Commission has made significant efforts to improve throughput (the total stock of cases was back at the pre-crisis level of slightly over 1 000 cases at the end of 2010 and was further reduced to slightly over 900 at the end of July 2011).

Nevertheless, the influx of new cases and the developments in the case-law regarding the processing of complaints and certain constraints (obligatory work, resources) have been such as to not allow the Commission to make a more substantial reduction in the backlog and really focus on the more distortive/important cases or ex officio work.

IV. second indent

The Commission welcomes the recommendation, which is also the aim pursued by the Best Practice Code which entered into force on 1 September 2009.

IV. third indent

The Commission welcomes the recommendation. By means of the 2009 Best Practice Code the Commission has already limited the number of requests for information and has recently introduced senior management controls on multiple information requests. Nevertheless, the number of information requests also depends on the quality of the information provided by Member States and can thus not simply be ascribed to the Commission.

As regards complaints, the case-law of the Court of Justice of the European Union has a wide notion of what constitutes an admissible complaint.

REPLY OF THE COMMISSION

IV. fourth indent

The Commission welcomes this recommendation. Such a system is due to be implemented from the beginning of 2012. On a voluntary basis, time recording was already carried out in some units of Competition DG.

IV. fifth indent

A full-scale horizontal *ex post* assessment of the effects of State aid control would be fraught with methodological difficulties and would necessarily remain rather general.

INTRODUCTION

7.

As far as private enforcement is concerned, and although it is easier to lodge a complaint with the European Commission rather than initiate legal proceedings, as in the other competition fields, private litigation is indeed used, which suggests that the cost of private enforcement is not necessarily a deterrent, in particular when there are significant funds at stake.

The two procedures do not have the same scope: national proceedings are not about incompatible aid, but concern its illegality, while the Commission cannot sanction the illegality of measures as such.

OBSERVATIONS

17.

Given the resource constraints the Commission is not in a position to make full use of all the information available in the public domain. The Commission will consider how a proportionate response could be provided in this area.

18.

The Commission's own analysis points to huge differences between Member States with 73 % of the total analysed unlawful aid arising in five Member States (Germany, Italy, Spain, France and United Kingdom). The data pointed to approximately 10 % of unlawful aid².

21.

By moving away from an *ex ante* control system, the Commission is acknowledging the need to enhance its monitoring activities.

The experience gained so far in monitoring will enable the exercise to be further refined in the coming years, inter alia focusing in particular on measures/Member States where problems were identified, and also to further refine the rules so as to avoid any ambiguity. In that context, it has been decided to increase the monitoring activities substantially. The scope of the 2011 monitoring exercise will double to cover 33 % of aid granted under approved aid schemes or block exemption regulations in 2009 (calculated on the basis of the aid expenditure, as declared by the Member States).

² Spring scoreboard 2007 update: COM(2007) 347, final, 28 June 2007.

REPLY OF THE COMMISSION

22.

Overall, the 2008 exercise confirms the results of earlier exercises: a majority of measures implemented under block exemption regulations or approved aid schemes are in line with the applicable rules. A few cases raise problems, but this does not necessarily mean that the aid granted was incompatible. It often happens that the measure can be approved on another basis or is *de minimis*. On 4.12.2009, six of the (then) pending monitoring cases (37 cases) were problematic.

The Commission agrees that good cooperation with Member States is essential for an efficient monitoring exercise. It regrets that Member States do not always provide reliable data on the amounts of aid granted. As a result, it can happen that the monitoring sample includes schemes under which no aid was granted, which limits the usefulness of the monitoring exercise. The Commission also regrets the reluctance of Member States, in certain cases, to provide information; this can delay and complicate the compliance check.

24.

The services of the Commission are aware of initiatives by some Member States to begin creating a central register on this type of aid and welcome such initiatives.

25.

Since support granted on the basis of the *de minimis* rule does not constitute State aid within the meaning of Art.107(1) TFEU, it is not included in the monitoring of approved and block exempted schemes. There is no legal obligation to monitor non-aid measures and the Commission, therefore, would only check compliance in the cases of suspicion and complaint. However, no complaints have been received in this context.

In view of its nature (limited amount of support), verification that the *de minimis* rule is being respected cannot be given the same priority in the context of monitoring as compared to measures under the general block exemption regulation or other aid measures, which may have more significant effects on competition and trade between Member States.

27.

It is very hard to identify hitherto unknown unlawful aid or to know how significant the problem is, since the aid is by definition not notified to the Commission. The Commission has looked at whether it is possible to use national reporting. However, in most cases, the definitions of public support and State aid are quite different and therefore the reports are not directly comparable (see Spring scoreboard 2007 update: COM(2007) 347, final, 28 June 2007).

The Commission has also stepped up its recovery effort (creation of dedicated unit within Competition DG) which acts as a deterrent against granting unlawful aid.

The Commission is stepping up its *ex post* monitoring (see paragraph 21).

28.

The notion of aid is an objective one applied under the scrutiny of the Court of Justice of the European Union, meaning that the Commission has no margin of appreciation. However, it is true that the case-law of the Court on the concept of aid does not leave much scope for non-aid decisions, which may explain why there are only a small number of decisions of this type. Furthermore, the Commission may leave the qualification of the measure open, if the latter would in any event be compatible with the internal market.

REPLY OF THE COMMISSION

The Commission is nevertheless considering updating its guidance instruments.

29.

According to the case-law of the Court of Justice of the European Union, the Commission cannot penalise a Member State — nor the beneficiary — for failing to observe the notification obligation. Only national courts are competent to act against the absence of notification or late notification (see e.g. Commission notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009, p. 1, points 19ff and the Court of Justice of the European Union judgments quoted therein which clarify the role of national courts).

If the Commission decides that incompatible aid has been granted, the beneficiaries only have to reimburse the aid with interest, to restore the situation that existed prior to the granting of the aid (see paragraph 68).

30.

There have been no complaints or cases where the Commission has become aware of a Member State which has not respected the withdrawal of the notification (see Spring scoreboard 2007 update: COM(2007) 347, final, 28 June 2007).

31.

Internal coordination meetings with the Competition country contact points for State aid matters have shown that the demand from Member States for this type of help desk relating to non case-related work is not very high. Some Member States contacted the contact points only rarely or not at all, although the new Member States have used the country contact points rather more. The general experience is that Member States either contact case teams directly or make use of their own channels. Also the launch of the electronic newsletter (which has more than 7 000 subscribers in the meantime) seems to have provided Member States with useful information on State aid matters. The growing practice of encouraging the holding of pre-notification meetings has also reduced the need for such informal contact points.

32. first indent

The notification obligation has been in the Treaty since the beginning and is incumbent on Member States, not on the decentralised granting authorities. Central authorities are therefore well aware of the notification obligation, although decentralised granting authorities are possibly less aware.

DG Competition also actively advocates the following through various channels: workshops/training on how to use the electronic notification system SANI, conferences in Member States, etc.

32. second indent

The function of the general block exemption regulation and the various guidelines and notices is to clarify when a State aid measure is considered to be compatible. The Commission is constantly striving to improve the quality of these texts in order to provide best guidance. Beyond this, given the great variety across Member States and aid granting authorities, the Commission is constrained in its ability to provide dedicated guidance.

REPLY OF THE COMMISSION

For instance, in the context of co-funded schemes, the Commission has recently asked Member States' Managing Authorities to involve their national bodies responsible for State aid coordination upfront in the design of State aid measures under the operational Programmes; when asked, the Commission will be available to advise the national bodies.

32. third indent

The Commission has issued various documents to assist stakeholders (e.g. Handbook on State aid rules for SMEs; Vademecum on State aid rules; Vademecum on the regeneration of deprived urban areas).

Specifically as regards SANI (which is the electronic notification application), the Commission has offered training sessions to all Member States on how to prepare notifications and on SANI in particular. Furthermore, Member States have a User Manual for SANI at their disposal. Additionally, Member States have a contact point in DG Competition for all matters relating to the preparation of a notification via SANI.

As part of the review of the guidelines, the Commission will also see whether the corresponding notification forms can be improved in order to ensure that the information requested in the notification form generally makes it easier to draw up a complete notification.

32. fourth indent

For nearly all new policy initiatives, the Commission has also issued FAQs when the text was adopted.

There is a separate regularly updated FAQ on the dedicated Internet page on the application of State aid rules to Services of General Economic Interest, which also includes an interactive information service available to answer further questions.

32. fifth indent

Help desk functions have been made available in the context of the crisis, both for the financial crisis and for the real economy.

33.

The Commission constantly strives for texts that are as clear as possible, but the issues to be addressed are often complex in terms of legal and economic analysis and can therefore not always be condensed into relatively simple and straightforward rules. A distinction should be made between the different types of rules that exist. Certain rules like the *de minimis* rule or the general block exemption regulation are straightforward directly applicable rules (*per se*), which are vested in extensive case practice and provide clear guidance, while for guidelines or frameworks which require the identification of a common European objective and a balance between negative and positive effects (as required by the Treaty), it is more difficult to cover all possible scenarios by means of precise rules. The rules can only establish the general principles to be applied.

REPLY OF THE COMMISSION

35.

The Commission welcomes the finding from the European Court of Auditors.

39.

Since the beginning of 2011, bimonthly meetings are held with all units and senior management to discuss on the basis of a case management plan, including expected deliveries as well as active/inactive status of cases. Thus, additional guidance is now provided to case teams to identify and monitor priorities, including negative priorities.

40.

PETRA, which was so far only used on a voluntary basis in certain units, will be rolled out across the entire Directorate-General, including the State aid network, as of 2012.

It will be complemented by a system measuring *ex ante* workload indicators for cases (preliminary discussion in the State aid Management Meeting of 1 July 2011 on the provisional results) which will be further refined on the basis of the experience gained.

Therefore, the Commission will obtain an accurate picture of resources and workload.

41. first indent

Since November 2010 a single case numbering system has been in use, regardless of the stage of the procedure.

41. third indent

All documents/correspondence relating to a new notification, complaint or non notified aid case must be registered with the Greffe to be part of the file and to be used for the decision.

The documents identified by the Court are useful to establish a full trail, but their absence does not create legal difficulties for the procedure. That is also confirmed by the fact that the General Court or the European Court of Justice do not consider the Commission's case files as incomplete.

45.

While it is accepted that the average time for taking a decision on notifications increased between 2005 and 2007, it should be noted that the number of information sheets under the block exemption regulations increased from 291 in 2005 to 631 in 2007. There is therefore the mechanical effect that when the easiest cases are no longer notified, the remaining notifications are likely to be more complex.

The fact that financial crisis cases were dealt with very swiftly and may have led to an improvement of the average duration should not obscure the fact that the staff working on these cases had to be partially reassigned from other cases (which thus received lower priority).

47.

The Manual of Procedure reflects what is laid down in the Best Practice Code which entered into force on 1 September 2009.

The 28 % include cases which pre-date the Manual of Procedure/Best Practice Code, where the rule recommending no more than two information requests did not yet apply.

When the Commission evaluated the results in September 2010, for approximately 95 % of closed cases there were no more than two information requests needed³.

Further information requests are also often needed in view of the replies provided by Member States to the first request for information.

³ 451 cases were registered in the period under review; within that period 312 cases were closed of which only four required more than two requests for information.

REPLY OF THE COMMISSION

49.

The volume and complexity of the questions are linked to the measures themselves and the information needed to analyse/approve them. In that respect, it is also worth remembering that the Commission has limited tools to collect market information other than by questions.

51.

The duration of the preliminary investigation depends in the first place on the quality of the notification by the Member States. The Commission must decide within two months of having received a complete notification, but there is no requirement to open the formal investigation procedure within six months of the initial — incomplete — notification. The duration of the initial investigation procedure will thus depend on the completeness of the initial notification, the complexity of the matter and the cooperation between the Commission and the Member State. Precisely in order to try to reduce the duration of the preliminary investigation phase, the Best Practice Code has suggested holding a pre-notification meeting to assess, among others, what information is required, with a view to having a complete notification and minimising the number of information requests.

53.

Better governance in State aid control is a shared responsibility between the Commission and the Member States. An important cause of these delays is the poor quality of some notifications from Member States.

The Commission has seen no evidence that the duration of case handling procedures has had an adverse effect on investments decisions, other than in very exceptional cases.

Member States have the means to react (see e.g. Art. 5(3) of the Procedural Regulation).

54.

A formal Mutually Agreed Planning as laid down in the Best Practices Code is not legally binding. It is only an intent to make one's best efforts — therefore, the added value compared to an informal arrangement is limited. The latter also offers more flexibility to Member States.

57.

The Commission notes the balanced reaction, with some in favour and some critical of the refined economic approach.

58.

The Commission has published a comprehensive stakeholders' survey in July 2010. Its results show a balanced view on the economic approach.

59.

The Commission can agree that the uptake of the simplified procedure from the side of Member States is limited so far. However, for the procedure to work, Member States have to apply for it.

60. second indent

The Commission notes that if this requirement is one of the cornerstones of a modern and transparent procedure, the reluctance of Member States to go outside the usual bilateral dialogue with the Commission may also complicate other transparency processes proposed by the Court, in particular as far as the handling of complaints is concerned (see Recommendation 2).

REPLY OF THE COMMISSION

60. fifth indent

In addition to the factors identified by the European Court of Auditors for the limited uptake of the simplified procedure, the Commission also considers that the possibilities offered by the Temporary Framework and the specific needs it covered in view of the financial crisis (in particular the limited amount of compatible aid) has affected its possible use. Under the Temporary framework, the Commission had committed to swift authorisations of such measures, generally in time periods shorter than those possible under the simplification package, and these may have been used as an alternative by some Member States at that time.

62.

Given the very large number of complaints, the limited information available in many complaint submissions, coupled with the limited powers of the Commission to gather relevant market information and the legal requirement to take decisions in all cases where a complainant with legal standing insists on the Commission adopting a decision, leads to long delays in some cases.

Nevertheless, the Commission has already managed, by applying a more focussed approach, to considerably reduce the stock of pending complaints between December 2010 (464) and July 2011 (400).

63.

The Commission is entitled to give different degrees of priority to the complaints brought before it (*Bouygues T-475/04*), depending for instance on the scope of the alleged infringement, the size of the beneficiary, the economic sector concerned or the existence of similar complaints. In the light of its workload and its right to set the priorities for investigations, it can thus postpone dealing with a measure which is not a priority.

This is also clarified in the Best Practice Code.

65.

The stock of complaints reviewed by the European Court of Auditors date from different periods — procedures in place have been refined over time. The current process is laid down in the Best Practice Code which had already tried to address the lacunae identified by the European Court of Auditors: e.g. a best effort to investigate a complaint within an indicative time frame of twelve months from its receipt, information as to the priority given to the complaint and information concerning the processing of a complaint to the Member States and the complainants.

A decision finding that there is no aid will be addressed to the Member State and the complainant only receives a copy of that decision.

66.

It has to be emphasised that this is not specific to complaints; for notified aid cases, too, there is normally no publicity prior to the opening of the formal investigation procedure. Transparency only exists in the context of the simplified procedure. Member States are generally opposed to such broad transparency during the preliminary investigation phase. The Procedural Regulation makes no provision for this either.

The requirement to translate in the authentic language and/or all languages is sometimes time consuming, but is also an essential transparency requirement.

The obligation of professional secrecy is a Treaty obligation. The need to strike the right balance between this obligation and the obligation to give reasons for decisions may sometimes involve lengthy discussions, but again this seems to be an essential procedural step.

REPLY OF THE COMMISSION

67.

The procedures for dealing with complaints have been clarified through a series of recent Court judgments which in principle require a Commission decision for complaints. The Commission can only explain to the complainant why a particular measure in their preliminary view does not concern alleged unlawful aid or explain that there is insufficient information to establish the presence of (unlawful) State aid.

The 12 months period has been introduced as a recommendation by the Best Practice Code and can thus not be the standard for cases pre-dating its entry into force in September 2009.

68.

The recovery policy is also an important instrument to curb the illegal granting of aid: non-notified aid, if found to be incompatible, will be recovered from the beneficiary. In order to avoid future liabilities, it is in the interest of the beneficiary that the aid measure has been notified (and approved). An effective recovery policy thus helps to maintain the standstill obligation.

73.

As to the long duration of recovery procedures overall, the Commission agrees and regrets the lack of cooperation on the part of certain Member States and the length of judicial procedures. At the same time, the Commission itself is doing what it can to speed things up, as shown by the European Court of Auditors' finding that the Commission has been reacting more quickly in recent years when it comes to bringing cases to the Court of Justice of the European Union.

74.

When the Commission has the necessary data at its disposal, it endeavours to quantify the exact amount of aid to be recovered.

At the same time, on the basis of the principle of fair cooperation, the Commission provides Member States with guidance, as necessary, to calculate the aid to be recovered.

75.

The Commission welcomes the finding from the European Court of Auditors on its handling of the crisis cases.

76.

The additional workload was absorbed through a combination of overtime, transfer of staff from other units and the exceptional nature of the working conditions to handle the cases. Even in those circumstances, the total stock of pending cases increased considerably in 2009–10.

77.

The guidelines set out clear conditions for State aid to be compatible with the internal market. The practical implementation of each principle depends very much on the specificities of the banks concerned. However, in each and every restructuring case, the assessment of measures has been carried out with proper attention to other cases, so that consistency across cases and a level playing field across banks and across Member States is maintained.

78.

The Commission welcomes the finding from the European Court of Auditors.

82.

The Temporary Framework was used by all Member States except Cyprus. They all introduced at least one, and in most cases between 2 and 4 schemes (loans, guarantees, export credit, compatible limited amount of aid). The fact that they did not always use the budget originally provided for tends to confirm that they made careful use of the Temporary Framework measures (the approval of the scheme allowed them to use it when needed, without necessarily using up the whole budget).

REPLY OF THE COMMISSION

The exceptional nature of the Temporary Framework, which was based on Article 107(3)(b) TFEU 'to remedy a serious disturbance in the economy of a Member State' requires a regular evaluation as to whether the conditions of application are still met. This explains why the Commission was unable to adopt an open-ended or very long running Temporary Framework.

85.

Apart from the quality issue, Member States quite often provide incomplete data by the deadline, which in turn requires the Scoreboard team to try to obtain the necessary data from Member States; this involves two rounds of questions which take over three months on average.

86.

Member States generally do not share with the Commission information concerning issues around their internal collection of data from regional and local authorities and data reliability. In this respect, the Commission refers to the methodological notes made in the Staff working document accompanying the State aid Scoreboard Autumn 2010 update, which outlines the scope of the data collection.

Although the reporting obligation requires Member States to provide an estimate where the actual expenditure cannot be determined in the reporting year, such an estimate is made only in a few cases. This is already mentioned in the context of the Scoreboard⁴.

⁴ Page 68 in the Staff working document accompanying the State aid Scoreboard, Autumn 2010 update
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:1462:FIN:EN:PDF>

89.

For the purpose of the State aid Scoreboard, subsidies to railways are excluded from the calculation of the total. For the first time, the Autumn 2010 update of the Scoreboard provides the total amount of the subsidy granted to railways in a separate chapter; from now on comparable data will therefore be available.

92.

Competition DG has revised the method of establishing the 'amount used' for aid measures to the financial sector and will apply it in respect of the Autumn 2011 update of the Scoreboard. In any event, the method used to calculate the aid component has been in line with the relevant Communications, e.g. impaired assets, guarantees.

93.

The Commission doubts that comparability of data between different years suffers from changes. First, the State aid reporting obligation, as laid down in Annex III of Commission Regulation (EC) No 794/2004, has not changed since its introduction with respect to its scope and content regarding data that Member States have to provide in their annual report. Second, key figures on State aid expenditure have been made public in the same way and by applying the same methodology of reference to allow data comparison.

94.

In accordance with the rules on Impact Assessment, Competition DG plans to carry out Impact Assessments for all State aid policy projects. By the end of 2011, four State aid impact assessments should be completed, eight in 2012, and six in 2013.

REPLY OF THE COMMISSION

95.

A comprehensive *ex post* evaluation of the impact of the State aid control is not feasible given the state of the science of economics and resource limitations. Nevertheless, the Commission will continue to carry out ad hoc evaluation of specific State aid control measures (e.g. http://ec.europa.eu/competition/publications/reports/temporary_stateaid_rules_en.html).

CONCLUSIONS AND RECOMMENDATIONS

96.

While Article 108(1) TFEU imposes an obligation to keep existing aid measures under constant review, Art. 108(3) TFEU requires the Commission to assess notified aid, there is no legal basis for a systematic review of Member States' procedures and control systems other than the principle of cooperation enshrined in Article 4 TEU.

The Commission actively pursues unlawful aid through a combination of complaints, *ex officio* cases and *ex post* control through monitoring of block exempted measures and approved schemes. A vigorous recovery policy acts as a further deterrent against unlawful aid.

National courts can complement the deterrent effect by penalising illegality (i.e. non-respect of the notification obligation).

The Commission has no means to steer the organisational set-up within Member States. The main tool for collecting information is via information requests to the Member States about concrete measures. Given these constraints there is indeed a risk that (some) aid goes undetected. However, potential beneficiaries are increasingly aware of the risk they run in receiving non-notified aid, as their auditors — amongst others — point this out to them.

Recommendation 1

The Commission shares the objective that more attention should be paid to advocacy, monitoring activities and *ex officio* inquiries. However, this objective would have to be balanced against other competing objectives. In this context, the Commission would like to point out that there is a legal obligation to deal with notifications and to follow up on complaints.

As a way to cope with these challenges, Competition DG has, since 2011, reviewed the operation of the State aid network in order to increase efficiency. A working group has made a number of recommendations which have been adopted and are currently being implemented.

Recommendation 1 (a)

The Commission welcomes the recommendation.

Recommendation 1 (b)

The scope of the 2011 monitoring exercise will double to cover 33 % of aid granted under approved aid schemes or block exemption Regulation in 2009.

Recommendation 1 (c)

Increased monitoring will contribute to detect illegal aid.

97.

The Commission welcomes the finding that many of the operational elements of case handling are well managed and that the financial crisis cases were handled swiftly.

The Commission is aware that complaint handling is a problem area and that there is a considerable backlog which is difficult to tackle. The Best Practice Code was aimed at tackling the lacunae identified by the European Court of Auditors within the current legislative and procedural framework.

REPLY OF THE COMMISSION

Nevertheless, since the beginning of 2011 Competition DG has started a backlog reduction exercise which has already led to a significant reduction of the number of pending complaints (see above paragraph 62).

The Commission also points to the crucial role for Member States in ensuring efficient State aid control.

98.

The Best Practice Code is meant to increase transparency and enhance predictability. The Commission would also point to the reluctance by Member States to make use of the simplified procedure in view of the transparency procedures it implies.

Recommendation 2 (a)

The current procedural set-up already requires the Commission to decide or open the formal investigation procedure on notified aid within 2 months following a complete notification.

Recommendation 2 (b)

The Commission accepts that the number of Requests for Information should be as limited as possible. This principle is already laid down in the Best Practice Code. Competition DG has also put in place control mechanisms.

Where Member States provide a comprehensive notification (possibly after a pre-notification contact), no information request will be needed. The number of information requests depends on the quality of the information provided by Member States.

Recommendation 2 (c)

The Commission notes this recommendation. However, the case-law of the Court of Justice of the European Union has a wide notion of what constitutes an admissible complaint.

Recommendation 2 (d)

The Commission accepts this recommendation which is already laid down in the Best Practice Code.

Recommendation 2 (e)

The Commission is already drawing lessons from its handling of financial crisis measures. Nevertheless, certain elements may not be easily transposable to other sectors of the economy.

Recommendation 2 (f)

The Commission plans to implement from early 2012 onwards an enhanced time recording system (building on the experience drawn from a voluntary pilot project), combined with an *ex ante* workload evaluation, which will help in the allocation of resources.

100.

The Commission recalls that its primary role is to prevent State aid that is incompatible with the Treaty. The compatibility assessment it performs already constitutes a form of impact assessment in the light of the objectives laid down in the Treaty, and taking account of distortions of competition and impact on trade.

A comprehensive *ex post* evaluation of the impact of the State aid control is not feasible given the state of the science of economics and resource limitations. Nevertheless, the Commission will continue to carry out ad hoc evaluation of specific State aid control measures (e.g. http://ec.europa.eu/competition/publications/reports/temporary_stateaid_rules_en.html).

Recommendation 3 (a)

To facilitate the data gathering and to increase efficiency, both for the Member States and for the Commission, Competition DG has introduced a new central database application by which granting authorities in the Member State can directly encode their aid expenditure. There are plans to bring this application, called SARI, into full operation by 2012.

As regards reliability, it is recalled that it is the Member States' responsibility to provide complete and accurate data. In this respect, the ongoing legislative project to amend the reporting obligations for Member States takes this point into account and includes a stronger wording regarding the complete and reliable data which Member States have to provide in their annual report.

Recommendation 3 (b)

See reply to paragraph 100.

European Court of Auditors

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THE COMMISSION HAS OVERALL RESPONSIBILITY FOR STATE AID CONTROL (ARTICLES 107-108 TFEU). EU MEMBER STATES ARE REQUIRED TO NOTIFY ALL PLANNED STATE AID MEASURES TO THE COMMISSION AND TO OBTAIN THE COMMISSION'S APPROVAL BEFORE IMPLEMENTING THEM.

THIS SPECIAL REPORT EXAMINES WHETHER THE COMMISSION'S PROCEDURES ENSURE EFFECTIVE MANAGEMENT OF STATE AID CONTROL.

THE COURT FOUND THAT THE COMMISSION HAS INSUFFICIENT ASSURANCE THAT IT DEALS WITH ALL RELEVANT STATE AID CASES. THERE IS NO LEGAL BASIS FOR A SYSTEMATIC REVIEW OF MEMBER STATES' PROCEDURES AND CONTROL SYSTEMS OTHER THAN THE PRINCIPLE OF COOPERATION. STATE AID PROCEDURES TAKE A LONG TIME. COMPLAINTS IN PARTICULAR LACK TRANSPARENCY. IN THE FIELD OF STATE AID CONTROL THE COMMISSION REACTED PROMPTLY TO THE FINANCIAL CRISIS. IT HAS NOT YET ASSESSED THE EX POST IMPACT OF ITS ACTIVITIES IN A COMPREHENSIVE WAY.

THE COURT MAKES RECOMMENDATIONS WITH AN AIM TO IMPROVING THE COMMISSION'S PROCEDURES AND MANAGEMENT EFFECTIVENESS.



EUROPEAN COURT OF AUDITORS



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