Proposition of Notice dealing with cooperation between Commission and national courts on State Aids subjects by Prof. Dr. Juan Ignacio Ruiz Peris, Mrs. Justice Mercedes Pedraz Calvo and Mrs. Justice Purificación Martorell Zulueta (*UVEG's State Aids Group*).

KEYWORDS: State Aids, Cooperation with national courts, amicus curiae.

At the end of 2020, the Commission has submitted to public consultation a proposal of *Commission Notice on enforcement of State aid rules by national courts*, that shall replace in the next future the existent of 2009 (2009/C 85/01), OJ C 85, 9.4.2009, p. 1–22. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52009XC0409%2801%29 (Multilingual versions). This one has not met the expectations placed on it. The number of cases ruled by national courts on public and private enforcement of EU State Aids rules was not impressive as was shown by the *Study on the enforcement of state aid rules and decisions by national courts* 2019, free download at https://op.europa.eu/en/publication-detail/-/publication/264783f6-ec15-11e9-9c4e-01aa75ed71a1

and cooperation between Commission and national courts has not been enough implemented from the extension of Block exemption regulations of 2012 to today.

The *UVEG's State Aids Group* has send some observations summarized in English here. You may see the original in Spanish at https://www.derechoderedes.es/novedades/observaciones-del-grupo-uveg-de-ayudas-publicas-a-la-propuesta-de-comunicacion-sobre-la-aplicacion-de-las-normas-sobre-ayudas-estatales-por-los-tribunales-nacionales-de-2020/

Find here the summary of the main ones: 1. On duties or burden imposed to national courts. 2. About the language employed. 3. About limiting time for Commission answers. 4. On documents exhibition. 5. *Amicus curiae*. 6. Principles of effectiveness and equivalence. 7. About the future digital platform and the informal consultations procedure. 8. Accompanying measures.

1. **On duties or burden imposed to national courts.**

As is traditional in EU Law duties of the State are direct to "Member States" in general without distinction between the different powers. This notice address in some cases direct to the national courts as a State. A distinction between the obligations incumbent on the State as legislator and regulator of the courts, on the governing bodies of the judiciary and on the national courts in the exercise of jurisdiction seems positive, but it's not possible or convenient transfer duties that should correspond to the State legislator to the National Courts. In this sense for instance, it does not seem reasonable to refrain from transmitting the information on the grounds that the requesting judicial body cannot offer a guarantee of non-disclosure, when the judicial process involves litigants who have access to the same information and who should also be subject to the duty of confidentiality.

It should be clarified what the guarantee consists of and what are the consequences of non-compliance in these cases for the State or for the particular court.

Consideration should be given to the elimination of the requirement of a guarantee that cannot be provided by the courts, in accordance with current legislation, in many states. In any case, the issue, which has many aspects, should be much more clearly defined.

Thought should be given also to the very elimination of the requirement of a guarantee that cannot be provided by the courts, in accordance with the regulations in force, in many states. In any case, the

issue, which has many aspects, should be much more clearly defined. It would be appropriate for the Commission to require a sufficient standard of confidentiality to be maintained by the legislating State and not by each individual court.

2. About the language employed.

We shall signal that the proposal language of the notice – an instrument of soft law – seems sometimes be the proper for a hard law rule. It would be convenient adapt the language to the real nature of the document.

We have stressed also the obscure and convoluted prose of some paragraphs, that doesn't seem likely to contribute to a clear understanding of the issues concerned, generating confusion, atomization of interpretation and other negative consequences by national courts.

We emphasize also that the very broad and ambiguous standing to sue advocated by the proposed communication will raise serious problems of compatibility with national procedures, especially in the field of private enforcement. In this range of questions, it might be relevant to identify the "affected party" as "injured party" with respect to actions for damages, and "interested party".

The basis of the limits posed to national *res judicata* by the principle of the primacy of European law is not clear, insofar as the NCAs, in these cases, apply precisely European law and act within their competences by delimiting whether or not there is a duty to suspend in the case in accordance with the provisions of the Judgment of the Court of Justice of 4 March 2020, Buonotourist v Commission, C-586/18 P, ECLI:EU:C:2020:152, paragraph 90. In this sense it would be appropriate to clarify the text with regard to the interrelation of the principle of primacy of European law vis-à-vis the so-called principle of res judicata and thus the configuration of national res judicata, in the light of European case-law and in particular the Judgment of the Court of Justice of 11 November 2015, Klausner Holz Niedersachsen, C-505/14, ECLI:EU:C:2015:742.

From other perspective, the adoption of positive interim measures may raise some issues such as those relating to the assessment of the existence of State aid and the determination of the amount of aid before pleadings of the parties other than the notice of appeal are filed.

A more detailed treatment of the peculiarities of actions for compensation in the field of State aid would be desirable with regard to the determination of the damage (with particular reference to the quantification of the damage and the difficulties inherent in its determination, with greater precision as to the concepts of compensation) and the prohibition of enlargement of the circle of beneficiaries.

3. About limiting time for Commission answers.

The Communication does not provide for a time limit for the Commission to reply to the request of an NCA or of a party to the amicus curiae proceedings, which may encourage dilatory requests from the parties. A short time limit - e.g. one month from the notification - and a mechanism of negative administrative silence should be introduced.

We propose the following text:

"If the period of one month has elapsed since the request is made by the court of the Member State, without the Commission having responded, it shall be understood that the Commission rejects the submission of observations as amicus curiae".

4. On documents exhibition.

Consideration should be given to the problem that might arise in identifying which documents are deemed necessary for the Commission's assessment of the appropriateness of making observations, in view of those actually available to the court. The Commission's request should specify the nature of the information it requires, so that the court can identify - from among the documents in the proceedings - those relevant to the possible preparation of the observations.

Perhaps this section should expressly mention "pleadings". It seems that the reference to "documents at its disposal" is being thought of more in the contentious-administrative proceedings, where there is an administrative file with which we could identify, which will not be the case in the proceedings before the civil and commercial jurisdiction.

5. *Amicus curiae.*

The question of the Commission's participation as amicus curiae should be regulated through national law and not through ad hoc resolutions of the national courts that could raise problems of annulment of the subsequent judgment due to procedural flaws.

It should be clarified that the intervention of the Commission as *amicus curiae* does not have the value of expert testimony.

It should be clarified, even in a generic way, the procedural moment or moments of the intervention of the Commission as *amicus curiae*.

As regards the assistance of the national courts to the Commission, it would seem appropriate to specify that the request made to the national courts to transmit to the Commission any written judgment they have rendered following the communication by the Commission of information or an opinion, or the submission of observations as amicus curiae, extends not only to the NJO who received the assistance of the Commission in any of its forms, but also to those hearing appeals thereon, including those of a constitutional nature.

6. Principles of effectiveness and equivalence

The proposed Communication should include criteria that would allow the national courts to apply the principles of effectiveness and equivalence more easily in their decisions.

7. About the future digital platform and the informal consultations procedure.

It should be specified whether, while the Commission implements the future digital platform and if the regime of informal consultations is eliminated or suspended and, if not, how it should be carried out.

8. Accompanying measures.

The accompanying measures in terms of information, training and networking, are very little developed without reference to specific programs and budgets, although they are essential for the achievement of a true cooperation between the national courts and the Commission.

It does not seem appropriate that Member States, potential offenders together with the companies that received illegal State aid, should be urged to set up coordination points for national State aid judges. It would seem more reasonable, realistic and efficient if this were an EU initiative, endowed with a budget.

The generic reference to training programs does not seem sufficient. The Communication should take into account the experience of existing programs such as the Training of National Judges on EU Competition Law, which each year includes State aid among its possible objectives, draw consequences and propose concrete measures in this respect.

Some conclusive remarks:

From my point of view, the new proposal doesn't introduce enough changes to think in an accelerate improvement of the situation. To do that is need an intense promotion action by the Commission in cooperation with the judicial actors and the European judicial associations and networks and platforms specialized in the interface EU competition and national courts, more funds, and a deeper study – going to particularities of national practice - about the needs of the courts in this field. The notice should also include mechanism of digital connection between national courts and Commission, that may put in place using the EU recovery aids programs on digitalization (JIRP).