

The Hague, 22 February 2017

Response of the Dutch authorities to the Consultation of the Code of Best Practice on the conduct of State aid control procedures
HT. 4816

The Dutch authorities welcome the opportunity to react on the consultation regarding the Code of Best Practice on the conduct of State aid control procedures. This response reflects the views of the Dutch "Interdepartementaal Steun Overleg (ISO)". The ISO is a State aid committee composed of all Dutch ministries and representatives of the regional and local authorities. The Dutch authorities wish to thank the Commission for the initiative of collecting the views of the Member States and stakeholders on the experience gained with the implementation of the Code in the past seven years. The Dutch authorities wish to underline that – even in the post SAM landscape – there is indeed a need for a revised Code of Best Practice on the conduct of State aid control procedures. The Dutch authorities wish to underline the importance of the availability of a revised Code in order to smoothen and improve the predictability of the State aid procedures.

Could the Commission consider to initiate a meeting with the Member States to discuss the topics of the Code?

1. Pre- notification

Pre-notification contacts

First of all we wish to underline that pre-notification contacts are considered to be very useful; however these kind of contacts should not be limited to contacts following the draft notification form. Equally important are the contacts before a draft notification form is sent to the Commission. In fact in our view the pre-notification phase can also start from the moment a Member State seeks contact with the Commission on a planned State aid measure.

A pre-notification phase (with or without the basis of a draft notification form) is particularly fruitful and useful in cases of planned State aid measures where discussions in an open, confidential and constructive atmosphere are necessary. We appreciate the flexibility of the case teams of the Commission while arranging pre-notification contacts. We would therefore like to keep the possibilities for informal contact with the Commission as they currently are. The Dutch authorities would appreciate if this phase keeps its informal character and will not be subjected to unnecessary conditions.

However, it should be clear that it is the Member State's decision to follow a pre-notification phase or to notify directly without pre-notification.

Member States usually expect the Commission to ask all important questions and required information in the pre-notification phase. As a result the investigation of the case in the formal notification phase should therefore not take too long and important questions should normally not pop up anymore in this phase of the procedure. It may be considered a disadvantage that the pre-notification phase is not limited in time by the rights of the Member States as set out in the EC Treaty Regulation no.2015/1589. Pre-notification can in some cases last quite long, for reasons which are not always clear to the Member States, which does not always have a positive impact on the overall duration of the State aid notification.

Involving the aid beneficiary can be very useful but it should be left to the Member State to decide when to do so. Especially in relation to the banking restructuring cases, the Dutch authorities have seen the benefit of including the financial institution involved in the contacts with the Commission.

In order to foster competitiveness we would like to ask the Commission to take a more flexible and favourable view on innovative concepts for new State aid measures from Member States. In those cases we can understand that the pre-notification or notification phase will take longer.

To conclude, the Dutch authorities have appreciated the fact that the Commission's services have been accessible for the Dutch authorities and beneficiaries. We would therefore wish to keep the flexibility and availability of the case teams on short notice for calls or meetings with the Member State and – where necessary – the beneficiary as a strong point in the Code.

2. Notification

Preliminary examination

The Commission usually sends us a comprehensive information request within 4 to 6 weeks after the notification. However in some cases further questions after (several) replies to the (initial) information request are raised which seem not always needed for the assessment of the case. As a general rule we would like to propose that the notification phase should not last longer than 5 months after the pre-notification phase and no longer than 7 months after a notification without pre-notification.

In some cases the questions raised by the Commission are difficult to answer, especially in cases where the Commission asks all kinds of (technical, confidential and sensitive) business information which the national authorities are not obliged to possess and assess under their national law. Those questions need to be answered in consultation with the beneficiary. The Dutch authorities would appreciate if the Commission could take that into consideration.

3. Formal Investigation Procedure

In order to improve the factual basis of a planned formal investigation, the Commission could consider to have informal contacts with the Member State concerned before the decision to initiate the formal investigation procedure. In certain circumstances this may have added value in order to streamline the course of the investigation. The informal contacts could be useful to inform the Member State concerned of the forthcoming decision to initiate the formal investigation procedure.

In order to ensure that the Commission addresses similar issues in a consistent manner across the internal market and in order to ensure an European level playing field, the Dutch authorities ask the Commission to (formal) investigate possible illegal state aid instruments or cases across several Member States in a coherently manner. This reduces the possibility that State aid instruments or state aid measures in a particular sector could materially restrict or distort competition within the internal market.

4. Complaints

The general experience of the Dutch authorities is that many complaints are brought before the Commission with ulterior motives, namely to oppose to a specific national project or activity. Therefore it is of the utmost importance that the Commission invites the complainants to use the complaints forms of the Commission in order to be able to establish whether or not they are interested parties within the meaning of article 108 (2) TWEU and of article 1 (h) of Regulation no. 2015/1589.

In our experience the Dutch authorities were not always informed that a complaint was brought against them nor were we always informed by the Commission on the state of play of the complaint. Sometimes the Member States need the Commission's formal opinion at the end of an examination (eg. there is no State aid), but in many cases the Member States do not hear anything anymore at the end of an examination.

Could the Commission provide guidance in the Code in which cases the Commission informs the Member State of the complaint and the result of the examination? Could the Commission provide a time limit in the Code for the handling of the complaint procedure?

5. Language waiver

The Dutch authorities try to use the English working language for exchanges with the Commission whenever it's possible. However in some cases it is clear that accurate legal opinions or explanations can best be given in the Dutch language. The Dutch authorities did agree to apply language waivers in order to improve the speed of the procedure in several cases (especially in the banking restructuring cases where speed was important), but stress that this should be decided in individual cases and not be considered as the general rule. We appreciate an English advance copy of the Commission's letters, but always expect a formal Dutch version afterwards.

6. New topics to be considered in the Code of Best Practice

The Dutch authorities find (sector) inquiries across Member States (Article 25 Procedural Regulation) useful in order to ensure that the Commission addresses similar issues in a consistent manner across the internal market.

The Commission has indeed conducted such inquiries and we find it useful to have a (informal) guidance on such inquiries within the Code.

In Article 7 of the Procedural Regulation a new procedure is described which the Commission may use after opening the formal investigation procedure. It regards the Market Information Tool (MIT). The Dutch authorities would welcome more guidance on the MIT in the Code. It is, for example, not clear on what basis a Member State could refuse to give permission to the Commission for using the MIT and which are the consequences of not giving a permission.

The network of country contact points is very useful and fruitful. It is important that the country contact point and the authorities of the Member State can cooperate in an informal and constructive manner. Therefore we'll find it not necessary to explain their role in the Code.

The Netherlands has a decentralised institutional set-up. This means all municipalities and provinces have to take care that they comply with the EU State aid rules. They are responsible for their own State aid cases, although there is central coordination by the Ministry of the Interior and Kingdom Relations. In such an institutional set-up it is difficult to (de)prioritise cases. Therefore it seems not appropriate to give guidance on the (informal) portfolio approach within the Code, since there is no basis in the Procedural Regulation.

It is useful to make a reference in the Code to the monitoring and its objectives and to give guidance on the handling of the monitoring cases within the Commission. Please bear in mind that in more complex or large monitoring cases it is quite impossible to answer the request for information within 20 working days. Could the Commission consider – as a general rule – that her request for information in large monitoring cases or other large cases been answered within 40 working days?

With regard to monitoring in restructuring cases where a monitoring trustee is appointed, it could be useful to set out the relation between the EC, the Member State and the Monitoring Trustee in the Code.