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NOTICE FROM THE COMMISSION

Best Practices Code on the conduct of State aid control proceedings

1. SCOPE AND PURPOSE OF THIS CODE

1. In 2005, the Commission adopted the State Aid Action Plan ('the SAAP')¹ to improve the effectiveness, transparency, credibility and predictability of the EC State aid regime. Based on the principle of 'less and better targeted State aid', the central objective of the SAAP is to encourage Member States to reduce their overall aid levels, whilst redirecting State resources to horizontal common interest objectives. To support this objective, the SAAP also calls for more effective, simple and predictable procedures in the State aid field.
2. The Commission wishes to reaffirm this commitment by issuing the present Best Practices Code to make procedures as productive and efficient as possible for all parties concerned. This Code is built on the experience acquired in the application of Council Regulation (EC) No 659/1999² ('the Procedural Regulation') and on internal studies on the duration of the different steps of the State aid procedure, the treatment of complaints and information gathering tools. The principal aim of this Code is to provide guidance on the day-to-day conduct of State aid proceedings, thereby fostering a spirit of better co-operation and mutual understanding between the Commission services, Member State authorities and the legal and business community.
3. A successful improvement of State aid procedures implies shared discipline and a mutual commitment on both the Commission's and the Member State's side. While the Commission cannot be held responsible for the consequences of a lack of cooperation from Member States and third parties, it will work to improve the conduct of its investigations and its internal decision-making process, in order to ensure greater transparency, predictability and efficiency of State aid procedures.
4. In line with modern State aids architecture, this Code is the ultimate part of a simplification package³ which contributes to more predictable and transparent procedures.
5. The specific features of an individual case may however require an adaptation of, or deviation from this Code⁴.

¹ State Aid Action Plan: Less and better targeted State aid: a roadmap for State aid reform 2005-2009, COM (2005) 107 final.

² Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [93] of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

³ Notice from the Commission on a simplified procedure for treatment of certain types of State aid (JO C85, 09.04.2009, p.1); Notice from the Commission on State aid enforcement by national courts (...)

⁴ In the context of the 2008 banking crisis, the Commission has taken appropriate steps to ensure the swift adoption of decisions upon complete notification, if necessary within 24 hours and over a weekend. See Communication from the Commission- The application of State aid rules to measures

6. The specificities of the fishery and aquaculture sectors and of the activities in the primary production, marketing or processing of agricultural products may also justify a deviation from this Code.

2. RELATIONSHIP TO COMMUNITY LAW

7. The Best Practices Code is not intended to provide a full or comprehensive account of the relevant legislative, interpretative and administrative measures which govern Community State aid control. It should be read in conjunction with and as a supplement to the basic rules governing State aids procedures.
8. This Code therefore does not create or alter any rights or obligations as set out in the Treaty establishing the European Community, the Procedural Regulation and the Implementing Regulation⁵, as amended from time to time and as interpreted by the case-law of the Community Courts.
9. The present Code details day-to-day Best Practices to contribute to speedier, more transparent and more predictable State aid procedures at each step of the investigation of a notified or non-notified case or a complaint.

3. PRE-NOTIFICATION

10. The Commission's experience demonstrates the added value of pre-notification contacts, even in seemingly standard cases. Pre-notification contacts provide the Commission services and the notifying Member State with the possibility to discuss the legal and economic aspects of a proposed project informally and in confidence prior to notification, and thereby enhance the quality and completeness of notifications. In this context, the Member State and the Commission services can also jointly develop constructive proposals for amending problematic aspects of a planned measure. This phase thus paves the way for a more speedy treatment of notifications, once formally submitted to the Commission. Successful pre-notifications should effectively allow the Commission to adopt decisions pursuant to Article 4(2), 4(3) and 4(4) of the Procedural Regulation within two months from the date of notification⁶.
11. Pre-notification contacts are strongly recommended for cases where there are particular novelties or specific features which would justify informal prior discussions with the Commission services. But informal guidance will be provided whenever a Member State calls for it.

taken in relation to financial institutions in the context of the current global financial crisis (OJ C 270, 25.10.08, p.8). As regard, the real economy, see Communication from the Commission — Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C83, 7.4.2009, p.1)

⁵ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article [93] of the Treaty (OJ L 140, 30.4.2004, p. 1) ('The Implementing Regulation').

⁶ This deadline cannot be respected where the Commission's services have to issue several requests for information due to incomplete notifications, [or where third parties raise substantiated concerns (see paragraph 24 below)].

3.1. Content

12. The pre-notification phase offers the possibility to discuss and provide guidance to the Member State concerned about the scope of the information to be submitted in the notification form to ensure its completeness as from the date of notification. A fruitful pre-notification phase will also allow discussions, in an open and constructive atmosphere, of any substantive issues raised by a planned measure. This is particularly important as regards projects which could not be accepted as such and should thus be withdrawn or significantly amended. It can also comprise an analysis of the availability of other legal bases or the identification of relevant precedents. In addition, a successful pre-notification phase will allow the Commission services and the Member State to address key competition concerns, economic analysis and, where appropriate, external expertise required to demonstrate the compatibility of a planned project with the Common market. The notifying Member State may thus also request the Commission services, in pre-notification, to waive the obligation to provide certain information foreseen in the notification form which in the specific circumstances of the case is not necessary for its examination. Finally, the pre-notification phase is decisive to determine whether a case qualifies *prima facie* for treatment under the simplified procedure⁷.

3.2. Scope and timing

13. In order to allow for a constructive and efficient pre-notification phase, it is in the interest of the Member State concerned to provide the Commission with the information necessary for the assessment of a planned State aid project, on the basis of a draft notification form, at the latest two weeks before the expected date of the pre-notification contact. . In order to facilitate swift treatment of the case, pre-notification contacts (E-mails, conference calls) will in principle be favoured rather than meetings.
14. As a general rule, pre-notification contacts should not last longer than 2 months and be followed by a complete notification. Should pre-notification contacts not bring the desired results, the Commission services may declare the pre-notification phase closed. However, since the timing and format of pre-notification contacts depend on the complexity of the individual case, pre-notification contacts may last several months in such instances. The Commission therefore recommends that, in cases which are particularly complex (e.g. rescue aid, large R&D, large individual aid or particularly large or complex aid schemes), Member States launch pre-notification contacts as early as possible to allow for meaningful discussions.
15. In the Commission's experience, involving the aid recipient in the pre-notification contacts is very useful, particularly for cases with major technical, financial and project-related implications. The Commission therefore recommends that beneficiaries of individual aid be involved in the pre-notification contacts.
16. Except in particularly novel or complex cases, the Commission services will endeavour to provide the Member State concerned with an informal preliminary assessment of the project at the end of the pre-notification phase. This non-binding assessment will not be an official position of the Commission, but informal guidance

⁷ See Notice from the Commission on a Simplified Procedure of certain types of State aid.

from the Commission services on the completeness of the draft notification and the *prima facie* compatibility of the planned project with the Common Market. In particularly complex cases, the Commission services may also provide written guidance, at the Member State's request, on the information still to be provided.

17. Pre-notification contacts are held in strict confidence. The discussions take place on a voluntary basis and remain without prejudice to the handling and investigation of the case following formal notification.
18. In order to enhance the quality of notifications, the Commission services will also endeavour to meet requests for training sessions by Member States. The Commission will also maintain regular contacts with Member States to discuss further improvements of the State aids procedure, in particular as regards the scope and content of the applicable notification forms.

4. MUTUALLY AGREED PLANNING

19. In cases which are particularly novel, technically complex or otherwise sensitive, or which have to be examined as a matter of absolute urgency, the Commission services will offer Mutually Agreed Planning to the notifying Member State to increase the transparency and predictability of the likely duration of a State aid investigation.

4.1. Content

20. Mutually Agreed Planning is a form of structured cooperation between the Member State and the Commission services, based on a joint planning and understanding of the likely course of the investigation and its expected time frame.
21. In this context, the Commission services and the notifying Member State could in particular agree on :
 - the priority treatment of the case concerned, in return for the Member State formally accepting the suspension of the examination⁸ of other notified cases originating from the same Member State, should this be necessary for planning or resource purposes⁹;
 - the information to be provided by the Member State and/or the beneficiary concerned, including studies or external expertise, or unilateral information-gathering by the Commission services; and
 - the likely form and duration of the assessment of the case by the Commission services, once notified.
22. In return for the Member State's efforts in providing all the necessary information in a timely manner and as agreed in Mutually Agreed Planning, the Commission services will endeavour to respect the mutually agreed time frame for the further investigation of the case, unless the information provided by the Member State or third parties raises unexpected issues.

⁸ See Article 4(5) of the Procedural Regulation *op. cit.*

⁹ For instance, in cases where the financial institutions of the European Union act as holding fund.

4.2. Scope and timing

23. Mutually Agreed Planning will in principle be reserved for cases which are so novel, technically difficult or otherwise sensitive that a clear preliminary assessment of the case by the Commission services proves impossible at the end of the pre-notification phase. In such cases, Mutually Agreed Planning will take place at the end of the pre-notification phase, and be followed by the formal notification.
24. However, the Commission services and the Member State concerned may also agree, at the latter's request, on Mutually Agreed Planning for the further treatment of the case at the outset of the formal investigation procedure.

5. THE PRELIMINARY EXAMINATION OF NOTIFIED MEASURES

5.1. Requests for information

25. In order to streamline the course of the investigation, the Commission services 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. Unless otherwise agreed in Mutually Agreed Planning, pre-notification should enable Member States to submit a complete notification thereby reducing the need for additional information. However, the Commission may raise subsequent questions most notably on points that have been raised by the Member States' answers, although this need not indicate that the Commission is experiencing serious difficulties in assessing the case.
26. Should the Member State fail to provide the requested information within the set deadline, the provision contained in Article 5.3 of the Procedural Regulation will, after one reminder, normally be applied, and the Member State informed that the notification is deemed to be withdrawn. Formal investigation procedures will normally be opened whenever the necessary conditions are met, and generally after two rounds of questions at most.

5.2. Agreed suspension of the preliminary investigation

27. In certain circumstances, the course of the preliminary investigation may be suspended if a Member State so requests to amend its project and bring it in line with State aid rules, or otherwise by common agreement. Suspension may only be granted for a period agreed in advance. Should the Member State fail to submit a complete, compatible project at the end of the suspension period, the Commission will resume the procedure from the point at which it was halted. The Member State concerned will normally be informed that the notification is deemed to be withdrawn, or the formal investigation procedure opened without delay in case of serious doubts.

5.3. State of Play contacts

28. At their request, notifying Member States will also be informed of the state of play of an ongoing preliminary investigation. Member States are invited to involve the beneficiary of an individual aid in these contacts.

6. THE FORMAL INVESTIGATION PROCEDURE

29. In light of the general complexity of cases subject to formal investigation, the Commission is committed to improve the transparency, predictability and efficiency of this phase as a matter of utmost priority, to contribute to meaningful decision-making in line with the needs of modern business. The Commission will therefore streamline the conduct of formal investigations through efficient use of all the procedural means at its disposal under the Procedural Regulation.

6.1. Publication of the decision and meaningful summary

30. Where the Member State concerned does not request the removal of confidential information, the Commission will endeavour to publish its decision to open the formal investigation procedure, including the meaningful summaries, within two months from the date of adoption of this decision.

31. In case of controversy about confidentiality issues, the Commission will apply the principles of its Communication of 1 December 2003 on professional secrecy¹⁰ and use it best endeavours to proceed with publication of the Commission decision within the shortest possible time frame from its adoption. The same Best Practice shall apply to the publication of all final decisions.

32. To improve the transparency of the procedure, the Member State, the beneficiary and other stakeholders (in particular third parties having submitted comments during the preliminary investigation and/or potential complainants) will be informed of all delays triggered by controversies concerning confidentiality issues.

6.2. Third parties' comments

33. According to Article 6 of the Procedural Regulation, interested parties shall submit comments within one month following the publication of the opening of a formal investigation procedure. This deadline will not be extended in general, and the Commission services will thus usually not accept any belated submission of information from third parties, including the beneficiary of the aid¹¹. Extensions may be granted only in exceptional duly justified cases, such as the provision of particularly voluminous factual information or following a contact between the Commission services and the third party concerned.

34. In order to improve the factual basis of the investigation of particularly complex cases, the Commission services may send a copy of the decision to open the formal investigation procedure to identified third parties including trade or business associations, and invite them to comment on specific aspects of the case¹². Third parties' cooperation in this context is purely voluntary, but if a third party chooses to provide comments, it is in its interest to submit those comments in a timely manner

¹⁰ Official Journal C297, 09.12.2003, p. 6-9.

¹¹ Without prejudice to Article 10 (1) of the Procedural Regulation.

¹² According to settled case law, the Commission is entitled to send the decision to open the formal investigation to identified third parties; see e.g. Case T-198/01, Technische Glaswerke Ilmenau v. Commission [2004] ECR II-2717, para. 195; T-198/01R, Technische Glaswerke Ilmenau v. Commission [2002] ECR II-2153; Joined Cases C-74/00 P and C-75/00 P, Falck Spa and others v. Commission [2002] ECR I-7869, para.83

so that the Commission will be able to take them into account. Therefore, the Commission will invite third parties to react within one month from the date of the Commission services' letter. The Commission will not wait any further for those comments to be submitted. In order to respect equal treatment between third parties the Commission will send the same invitation to comment to the aid beneficiary. In order to respect Member State's right of defence, it will forward to the Member State a non-confidential version of any comments received by third parties and invite Member State to reply within one month.

35. In order to ensure transmission of all third party comments to the Member State concerned in the most expedient manner, Member States will, as far as possible, be invited to accept transmission of third parties' comments in their original language. If a Member State so requests, the Commission services will provide a translation, which may have implications as regards the expediency of procedures.
36. Member States will also be informed of the absence of any third party comments.

6.3. Member States' comments

37. To ensure timely completion of the formal investigation procedure, the Commission will closely enforce all deadlines applicable to this phase under the Procedural Regulation. If a Member State fails to submit its comments on the Commission's opening decision and on third parties' comments within the one-month deadline set in Article 6(1) of the Procedural Regulation, the Commission services will immediately send a reminder granting the Member State concerned one additional month and informing the Member State that no further extension will be granted, save in exceptional circumstances. In the absence of a meaningful reply by the Member State concerned, the Commission will take a decision on the basis of the information at its disposal, in line with Article 7(7) and 13 (1) of the Procedural Regulation.
38. In case of unlawful aid, and in the absence of the Member State's comments on the opening decision, the Commission will, pursuant to Article 10 of the Procedural Regulation proceed with issuing an information injunction. Should the Member State fail to reply to this injunction within the deadline set therein, the Commission will take a decision on the basis of the information at its disposal.

6.4. Request for additional information

39. It cannot be excluded that, in particularly complex cases, the information submitted by the Member State in response to the opening decision may require the Commission services to send a further request for information. A deadline of one month will be set for the Member State to reply.
40. Should the Member State not reply within the set deadline, the Commission services will immediately send a reminder setting an ultimate deadline of 15 working days and informing the Member State concerned that the Commission will thereafter take a decision on the basis of the information at its disposal, or issue an information injunction in case of unlawful aid.

6.5. Justified suspension of the formal investigation

41. Only in exceptional circumstances and by common agreement may the formal investigation be suspended. Suspension could, for example, occur if the Member State formally so requests in order to bring its project in line with State aid rules, or in case of pending litigation before the Community courts regarding similar issues, the outcome of which is likely to have an impact on the assessment of the case.
42. Formal suspension will normally only be granted once, and for a period agreed in advance between the Commission services and the Member State concerned.

6.6. Adoption of the final decision and justified extension of the formal investigation

43. By virtue of Article 7(6) of the Procedural Regulation, the Commission will as far as possible endeavour to adopt a decision within a period of 18 months from the opening of the procedure. This time limit may be extended by common agreement between the Commission and the Member State concerned. An extension of the investigation may in particular be appropriate in cases concerning novel projects or raising novel legal issues.
44. In order to ensure an effective implementation of this deadline, the Commission will endeavour to adopt the final decision no later than 4 months after the submission of the last information by the Member State, or fruitless expiry of the last deadline.

7. COMPLAINTS

45. The efficient and transparent handling by the Commission services of complaints brought before them is of considerable importance to all stakeholders in State aid procedures. The Commission therefore proposes the following Best Practices, designed to contribute to this joint objective.

7.1. The complaint form

46. The Commission services will systematically invite complainants to use the new complaints form available on DG Competition's website (http://ec.europa.eu/comm/competition/forms/sa_complaint_en.html) and, at the same time, to submit a non-confidential version of the complaint. The submission of complete forms will normally allow complainants to enhance the quality of their submissions.

7.2. Indicative time frame and outcome of the investigation of a complaint

47. The Commission will use its best endeavours to investigate a complaint within an indicative time frame of twelve months from its receipt. This time-limit does not constitute a binding commitment. Depending on the circumstances of the individual case, the possible need to request complementary information from the complainant, the Member State or third parties may prolong the investigation of a complaint.

48. The Commission is entitled to give different degrees of priority to the complaints brought before it¹³, 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 investigations¹⁴, it can thus postpone dealing with a measure which is not a priority. Within twelve months, the Commission will, therefore, in principle, endeavour to:
- adopt a decision for priority cases pursuant to Article 4 of the Procedural Regulation, with a copy addressed to the complainant; or
 - send an initial administrative letter to the complainant setting out its preliminary views on non-priority cases. This administrative letter is not an official position of the Commission, but only a preliminary view of the Commission services, based on the information available and pending any additional comments the complainant might wish to make within one month from the date of this letter. If further comments are not provided within this deadline, the complaint shall be deemed to be withdrawn.
49. As a matter of transparency, the Commission services will use their best endeavours to inform the complainant of the priority status of its submission, within two months from the date of receipt of the complaint. In case of unsubstantiated complaints, the Commission services will inform the complainant within two months from receipt of the complaint that there are insufficient grounds for taking a view on the case, and that the complaint shall be deemed to be withdrawn if further substantive comments are not provided within one month. As regards complaints which refer to approved aid, the Commission services will also endeavour to reply to the complainant within 2 months from receipt of the complaint.
50. In case of unlawful aid, complainants will be reminded of the possibility to initiate proceedings before national courts, which can order the suspension or recovery of such aid¹⁵.
51. When necessary, the non-confidential version of a complaint will be transmitted to the Member State concerned for comments. Member States and the complainants will systematically be kept informed of the closure or other processing of a complaint. In return, Member States will be invited to respect the deadlines for commenting and providing information on complaints transmitted to them. They will also be invited to accept, as far as possible, transmission of complaints in their original language. If a Member State so requests, the Commission services will provide a translation, which may have implications as regards the expediency of procedures.

¹³ Case C-119/97 Ufex and Others v Commission [1999] ECR I-1341, paragraph 88.

¹⁴ Case T-475/04, Bouygues SA v Commission [2007] ECR II-2097, paragraph 158 and 159.

¹⁵ See Commission Notice on the Enforcement of State Aid Law by National Courts.

8. INTERNAL DECISION MAKING PROCEDURES

52. The Commission is committed to streamline and further improve its internal decision-making process, in order to contribute to an overall shortening of State aid procedures.
53. To this effect, internal decision-making procedures will be applied as efficiently as possible. The Commission will also review its current internal legal framework to optimize its decision-making procedures.
54. The Commission services will keep their internal decision-making practice under constant review and adapt it if necessary.

9. FUTURE REVIEW

55. Procedural Best Practices can only be effective if they are based on a shared commitment of the Commission and Member States to diligently pursue State aid investigations, respect applicable deadlines and thereby ensure the necessary transparency and predictability of procedures. This Code and the Best Practices enshrined therein are a first contribution to this joint commitment.
56. The Commission will apply this Code to cases which have been notified to the Commission or cases otherwise brought to the Commission's attention as from the thirtieth day following that of its publication in the *Official Journal of the European Union*.
57. This Code may be revised to reflect changes to legislative, interpretative and administrative measures or due to case law of the European Courts, which govern State Aid procedure or any experience gained in its application. The Commission further intends to engage, on a regular basis, in a dialogue with the Member States and other stakeholders on the experience gained in the application of the Procedural Regulation in general, and this Best Practices Code in particular.

