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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')<sup>1</sup> 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 659/1999<sup>2</sup> ('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 will thus systematically draw the consequences of a lack of cooperation from Member States and third parties, it will also 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 package<sup>3</sup> to contribute to more predictable and transparent procedures.
5. The specificity of an individual case may however require an adaptation of, or deviation from this Code, depending on the case at hand<sup>4</sup>.

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

<sup>2</sup> 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).

<sup>3</sup> ....

<sup>4</sup> This may, in particular, be the case as regards State aids granted in the fishery and aquaculture sectors, activities in the primary production of agricultural products or activities in the processing or marketing of agricultural products. Also, 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

## **2. RELATIONSHIP TO COMMUNITY LAW**

6. 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.
7. 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 Regulation<sup>5</sup>, as amended from time to time and as interpreted by the case-law of the Community Courts.
8. 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 a State aid investigation: the pre-notification phase; the preliminary examination of notified aid; the formal investigation phase; the treatment of complaints; and internal decision-making.

## **3. PRE-NOTIFICATION**

9. 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 notification<sup>6</sup>.
10. 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.

### **3.1. Content**

11. 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

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State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (OJ C 270, 25.10.08, p.8).

<sup>5</sup> 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').

<sup>6</sup> 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).

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.

### 3.2. **Scope and timing**

12. In order to allow for a constructive and efficient pre-notification phase, the Member State concerned will 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. The Member State will also submit a non confidential draft summary of the notification to be published in the Commission's website. In the interest of the Member State and of the Commission services, pre-notification contacts (E-mails, conference calls) will be favoured rather than meetings.
13. 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 exceptionally last several months. The Commission therefore recommends that, in cases which are particularly complex or which have to be examined as a matter of absolute urgency (e.g. rescue aid, large R&D, large individual aid or particularly large or complex aid schemes), Member States launch pre-notification contacts at an early stage of the project definition to allow for meaningful discussions.
14. 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 pre-notification contacts.
15. 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 oral guidance 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.

16. 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.
17. 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**

18. 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. Scope and timing**

19. 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.
20. 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.

##### **4.2. Content**

21. Mutually Agreed Planning is a form of structured cooperation between the Member State and the Commission services, based on a joint understanding of and a clear commitment to the likely course of the investigation and its expected time frame.
22. In this context, the Commission services and the notifying Member State should in particular agree on :
  - the priority treatment of the case concerned, in return for the Member State accepting formal suspension of the investigation of other cases originating from the same Member State, should this be necessary for planning or resource purposes<sup>7</sup>;
  - the information to be provided by the Member State and/or the beneficiary concerned, including studies, 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.

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<sup>7</sup> For instance, in cases where the financial institutions of the European Union act as holding fund.

23. In return for the Member State 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.

## **5. THE PRELIMINARY EXAMINATION OF NOTIFIED MEASURES**

### **5.1. Publication of non-confidential summaries of notifications**

24. The Commission will publish non-confidential summaries of notifications<sup>8</sup> in the Commission's website<sup>9</sup>. Third parties' comments will only be considered if their submission reaches the Commission within 10 working days from the date of publication and includes a non-confidential version<sup>10</sup>. Where the Commission considers opening the formal investigation procedure, the Member State concerned will as a matter of good administrative practice be granted access to the non-confidential version of relevant comments received, and will have the opportunity to present its own comments within 20 working days.

### **5.2. 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, save in exceptional cases, normally to be sent within 4-6 weeks after the date of notification. Unless otherwise agreed in Mutually Agreed Planning, no requests for information should normally be necessary for cases notified after pre-notification contacts.
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, systematically be applied, and the Member State informed that the notification is deemed to be withdrawn. Formal investigation procedures will also promptly be opened whenever the necessary conditions are met, and generally after two rounds of questions at most.

### **5.3. 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 Member State concerned

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<sup>8</sup> Save in exceptional circumstances, such as those contemplated in footnote 4.

<sup>9</sup> See annexed summary publication form ("cartouche").

<sup>10</sup> This does not imply any increase of third parties' rights in view of the case law of the CFI. See Case T-95/03, Asociación de Empresarios de Estaciones de Servicio de la Comunidad Autónoma de Madrid and Federación Catalana de Estaciones de Servicio v Commission of the European Communities, [2006] ECR II-04739, paragraph 139 and case T-73/98, Prayon-Rupel/Commission, [2001] ECR II-867, paragraph 45.

will be informed that the notification is deemed to be withdrawn, or the formal investigation procedure opened without delay in case of serious doubts.

#### **5.4. 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, especially in novel, technically complex or otherwise sensitive cases.

### **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 suppression 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 secrecy<sup>11</sup> 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 as a matter of principle, and the Commission services will thus not accept any belated submission of information from third parties, including the beneficiary of the aid. Exceptions may be granted only in 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.

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

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 and invite them to comment on specific aspects of the case. Third parties' cooperation in this context is purely voluntary, but if a third party chooses to provide comments, it will have to react within one month from the date of the Commission services' letter. No extension of the deadline may be accepted, save in exceptional, duly justified cases.
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. Should a Member State not be in a position to accept this transmission, the Member State concerned, the beneficiary and the interested third parties will be informed of the time and resource implications involved in translating third party submissions.
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. 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) 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 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 individual 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 illegal aid.

## **6.5. Adoption of the final decision and justified suspension**

41. 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.
42. 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.
43. 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. However, formal suspension of an investigation may also be agreed in cases concerning novel projects or raising novel legal issues, where the absence of established Commission precedent would otherwise trigger a negative decision.
44. Formal suspension may only be granted once, and for a period agreed in advance between the Commission services and the Member State concerned.

## **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](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, while acting as a filter for unsubstantiated complaints.

### **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, but depends on the circumstances of the individual case. In particular, 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 it<sup>12</sup>. In the light of its workload and its right to set the priorities for investigations<sup>13</sup>, it can thus postpone dealing with a measure which does not raise serious difficulties. 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. In case of unsubstantiated complaints, the Commission services will use their best endeavours to 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 normally reply to the complainant within 2 months from receipt of the complaint.
50. In case of unlawful aid, complainants will be encouraged to launch action before national courts, which can order the suspension or recovery of such aid<sup>14</sup>.
51. Reflections will be launched on the opportunity to reject State aid complaints for lack of Community interest. To this effect, objective criteria will be established to assess the Community interest by reference to the significance of the alleged infringement, compared to the scope of the investigation required, or to the alternative means of redress available.
52. 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 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. Should this prove impossible for the Member State concerned, the Member State and the complainant will be informed of the time and resource implications involved in the resulting translations.

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<sup>12</sup> Case C-119/97 Ufex and Others v Commission [1999] ECR I-1341, paragraph 88.

<sup>13</sup> Case T-475/04, Bouygues SA v Commission [2007] ECR II-2097, paragraph 158 and 159.

<sup>14</sup> See Commission Notice on the Enforcement of State Aid Law by National Courts.

## **8. INTERNAL DECISION MAKING PROCEDURES**

53. 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.
54. 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.
55. The Commission services will keep their internal decision-making practice under constant review and adapt it if necessary.

## **9. FUTURE REVIEW**

56. 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.
57. The Commission will apply this Code as from the thirtieth day following that of its publication in the *Official Journal of the European Union*.
58. 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.

## **ANNEX: Outline of notification cartouche**

### **Notification of a State aid measure**

On ... the Commission received a notification of an aid measure pursuant to Article 88 of the EC Treaty.

The Commission invites interested third parties to submit their possible observations on the proposed measure to the Commission.

The main features of the aid measure are the following:

Reference number of the aid: N ....

Member State: ....

Region:

Title (and/or name of beneficiary):

National legal basis: (weblink: ....)

Proposed Community basis for assessment: ... guidelines or established Commission practice as highlighted in Commission decisions [1, 2 and 3].

Type of measure: Aid scheme / Ad hoc aid

Amount of aid:

Objective: (2 lines maximum)

Form of aid: Direct grant / loan / guarantee /.....

Type of beneficiaries: SMEs/large enterprises/both

Eligible costs: costs as described in section ...of the ...guidelines (net present value)

Budget:

Aid intensity:

Duration:

Economic sectors:

Name and address of the granting authority: (weblink.....)

Observations must reach the Commission no later than 10 working days following the date of this publication. Observations can be sent to the Commission by fax (....), by post or per e-mail under reference number N ...to the following address:...