

Code of Best Practice for the conduct of State aid control procedures

(2009/C 136/04)

1. SCOPE AND PURPOSE OF THIS CODE

1. In 2005, the Commission adopted the State Aid Action Plan: Less and better targeted State aid: a roadmap for State aid reform 2005-2009 ('the SAAP') ⁽¹⁾ to improve the effectiveness, transparency, credibility and predictability of the State aid regime under the Treaty establishing the European Community. 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 that commitment by issuing this Code of Best Practice 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 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽²⁾ and on internal Commission 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 procedures, 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 requires discipline on both sides and a mutual commitment from the Commission and the Member States. While the Commission cannot be held responsible for the consequences of a lack of cooperation from Member States and interested 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 final part of a simplification package comprising the Notice from the Commission on a simplified procedure for treatment of certain types of State aid ⁽³⁾ and the Commission Notice on the enforcement of State aid law by national courts ⁽⁴⁾ 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 Code ⁽⁵⁾.
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. This 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 aid procedures.

⁽¹⁾ COM(2005) 107 final.

⁽²⁾ OJ L 83, 27.3.1999, p. 1.

⁽³⁾ See page 3 of this Official Journal.

⁽⁴⁾ OJ C 85, 9.4.2009, p. 1.

⁽⁵⁾ 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 taken in relation to financial institutions in the context of the current global financial crisis (OJ C 270, 25.10.2008, p. 8). As regards 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 C 83, 7.4.2009, p. 1).

8. This Code therefore does not create or alter any rights or obligations as set out in the EC Treaty, Regulation (EC) No 659/1999 and Commission Regulation (EC) No 794/2004 of 21 April 2004 ⁽¹⁾, which implements Regulation (EC) No 659/1999, as interpreted by the case-law of the Community Courts.
9. This Code sets out 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 CONTACTS

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), (3) and (4) of Regulation (EC) No 659/1999 within two months from the date of notification ⁽²⁾.
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.

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 it is complete 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 procedure ⁽³⁾.

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. In order to facilitate swift treatment of the case, contacts by emails or conference calls will in principle be favoured rather than meetings. Within two weeks from the receipt of the draft notification form, the Commission services will normally organise a first pre-notification contact.

⁽¹⁾ OJ L 140, 30.4.2004, p. 1.

⁽²⁾ This time limit cannot be respected where the Commission's services have to issue several requests for information due to incomplete notifications.

⁽³⁾ See Notice from the Commission on a simplified procedure for treatment of certain types of State aid.

14. As a general rule, pre-notification contacts should not last longer than 2 months and should 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. The Commission therefore recommends that, in cases which are particularly complex (for example, rescue aid, large research and development aid, 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 beneficiary 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. That non-binding assessment will not be an official position of the Commission, but informal 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.
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 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 aid 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 examination ⁽¹⁾ of other notified cases originating from the same Member State, should this be necessary for planning or resource purposes ⁽²⁾,

⁽¹⁾ See Article 4(5) of Regulation (EC) No 659/1999.

⁽²⁾ For instance, in cases where the financial institutions of the European Union act as holding fund.

- 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 the context of 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 interested parties raises unexpected issues.

4.2. Scope and timing

23. Mutually agreed planning will in principle be reserved for cases which are so novel, technically complex 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 subsequently raise questions most notably on points that have been raised by the Member States' answers, although this does not necessarily 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 prescribed period, Article 5(3) of Regulation (EC) No 659/1999 will, after one reminder, normally be applied, and the Member State will be informed that the notification is deemed to have been withdrawn. The formal investigation procedure will normally be initiated whenever the necessary conditions are met, and generally after two rounds of questions at most.

5.2. Agreed suspension of the preliminary examination

27. In certain circumstances, the course of the preliminary examination 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, *prima facie* 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 have been 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 be informed of the state of play of an ongoing preliminary examination. Member States are invited to involve the beneficiary of an individual aid in these contacts.

6. THE FORMAL INVESTIGATION PROCEDURE

29. In the light of the general complexity of cases subject to formal investigation, the Commission is committed to improving 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 available to it under Regulation (EC) No 659/1999.

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 that decision.
31. Where there is disagreement concerning confidentiality issues, the Commission will apply the principles of its Communication of 1 December 2003 on professional secrecy in State aid decisions ⁽¹⁾ and use its best endeavours to proceed with publication of the decision within the shortest possible time frame following its adoption. The same will 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 potential complainants) will be informed of all delays triggered by disagreements concerning confidentiality issues.

6.2. Comments from interested parties

33. According to Article 6 of Regulation (EC) No 659/1999, interested parties must submit comments within a prescribed period which must normally not exceed one month following the publication of the decision to initiate the formal investigation procedure. That time limit will not normally be extended, and the Commission services will thus usually not accept any belated submission of information from interested parties, including the beneficiary of the aid ⁽²⁾. Extensions may be granted only in exceptional duly justified cases, such as the provision of particularly voluminous factual information or following contact between the Commission services and the interested 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 initiate the formal investigation procedure to identified interested parties including trade or business associations, and invite them to comment on specific aspects of the case ⁽³⁾. Interested parties' cooperation in this context is purely voluntary, but if an interested party chooses to provide comments, it is in its interest to submit those comments in a timely manner so that the Commission will be able to take them into account. Therefore, the Commission will invite interested parties to react within one month from the date on which the copy of the decision is sent to them. The Commission will not wait any further for those comments to be submitted. In order to ensure equal treatment between interested parties the Commission will send the same invitation to comment to the aid beneficiary. In order to respect the Member State's right of defence, it will forward to the Member State a non-confidential version of any comments received from interested parties and invite the Member State to reply within one month.

⁽¹⁾ OJ C 297, 9.12.2003, p. 6.

⁽²⁾ Without prejudice to Article 10(1) of Regulation (EC) No 659/1999.

⁽³⁾ According to settled case-law, the Commission is entitled to send the decision to open the formal investigation to identified third parties; see for example, Case T-198/01 *Technische Glaswerke Ilmenau v. Commission* (2004) ECR II-2717, paragraph 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, paragraph 83.

35. In order to ensure transmission of all comments from interested parties to the Member State concerned in the most expedient manner, Member States will, as far as possible, be invited to accept transmission of those 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 comments from interested parties.

6.3. Member States' comments

37. To ensure timely completion of the formal investigation procedure, the Commission will rigorously enforce all time limits applicable to this phase under Regulation (EC) No 659/1999. If a Member State fails to submit its comments on the Commission's decision to initiate the formal investigation procedure and on interested parties' comments within the one-month time limit set in Article 6(1) of Regulation (EC) No 659/1999, the Commission services will immediately send a reminder granting the Member State concerned an additional period of one 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 available to it, in accordance with Article 7(7) and Article 13(1) of Regulation (EC) No 659/1999.
38. In the case of unlawful aid, and in the absence of comments from the Member State on the decision to initiate the formal investigation procedure, the Commission will, pursuant to Article 10 of Regulation (EC) No 659/1999, issue an information injunction. Should the Member State fail to reply to that injunction within the time limit set therein, the Commission will take a decision on the basis of the information available to it.

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 decision to initiate the formal investigation procedure may require the Commission services to send a further request for information. A time limit of one month will be set for the Member State to reply.
40. Should the Member State not reply within the time limit, the Commission services will immediately send a reminder setting a final 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 available to it, or issue an information injunction in the case of unlawful aid.

6.5. Justified suspension of the formal investigation

41. Only in exceptional circumstances and by common agreement between the Commission services and the Member State concerned may the formal investigation be suspended. Suspension could, for example, occur if the Member State formally requests a suspension in order to bring its project in line with State aid rules, or if there is 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. 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. In accordance with Article 7(6) of Regulation (EC) No 659/1999, the Commission will as far as possible endeavour to adopt a decision within a period of 18 months from the opening of the procedure. That time limit may be extended by common agreement between the Commission and the Member State concerned. An extension of the duration of the investigation may in particular be appropriate in cases concerning novel projects or raising novel legal issues.
44. In order to ensure effective implementation of Article 7(6) of Regulation (EC) No 659/1999, 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 the expiry of the last time limit without information having been received.

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 that joint objective.

7.1. The complaint form

46. The Commission services will systematically invite complainants to use the new complaints form available on DG's Competition 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. That 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 interested parties may extend the investigation of a complaint.
48. The Commission is entitled to give different degrees of priority to the complaints brought before it ⁽¹⁾, 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 ⁽²⁾, it can thus postpone dealing with a measure which is not a priority. Within twelve months, the Commission will, therefore, in principle, endeavour to:
- (a) adopt a decision for priority cases pursuant to Article 4 of Regulation (EC) No 659/1999, with a copy addressed to the complainant;
 - (b) send an initial administrative letter to the complainant setting out its preliminary views on non-priority cases. The 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 the letter. If further comments are not provided within the prescribed period, the complaint will be deemed to be withdrawn.

⁽¹⁾ Case C-119/97 *Ufex and Others v Commission* (1999) ECR I-1341, paragraph 88.

⁽²⁾ Case T-475/04 *Bouygues SA v Commission* (2007) ECR II-2097, paragraphs 158 and 159.

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 the 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 will 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 the 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 aid ⁽¹⁾.
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 time limits 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.

8. INTERNAL DECISION MAKING PROCEDURES

52. The Commission is committed to streamlining and further improving 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 optimise 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 by the Commission and Member States to diligently pursue State aid investigations, respect applicable time limits 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 measures which have been notified to the Commission or otherwise brought to the Commission's attention as from 1 September 2009.
57. This Code may be revised to reflect changes to legislative, interpretative and administrative measures or the 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 Regulation (EC) No 659/1999 in general, and this Code of Best Practice in particular.

⁽¹⁾ See Commission Notice on the enforcement of State aid law by national courts.