

The Hague, 13 April 2021

Dutch contribution to Consultation on the draft Commission Notice on the enforcement of State aid rules by national courts

This contribution reflects the views of the Dutch 'Interdepartementaal Staatssteun Overleg (hereafter: ISO)'. The ISO is a central State aid coordination body composed of all Dutch ministries and representatives of the regional and local authorities. The ISO is chaired by the Ministry of Economic Affairs and Climate Policy. The Minister of Economic Affairs and Climate Policy is responsible for competition policy in the Netherlands.

This contribution addresses the draft Commission Notice on the enforcement of State aid rules by national courts. The Dutch authorities welcome the guidance on the coherence between the procedures before the Commission and national court proceedings and the practical information on the enforcement of State aid rules at national level.

The Dutch authorities ask the European Commission to clarify and adjust some aspects of the Notice, specifically concerning the following points:

- In point 15 reference is made to the block exemption regulations and the *de minimis* regulations. However, these are two different situations as application of the GBER still concerns State aid while the *de minimis* regulations set the condition according to which no aid is present. A reference to the *de minimis* regulations would fit better under point 14.
- In point 24 an interest of others than competitors to address the national court seems to broaden the element of standing as this point states that national courts must assess the legal interest of the claimant in bringing proceedings, regardless of whether the latter has been directly affected by the distortion of competition arising from the aid measure. However, we understand that in Article 1, sub h and the form of complaints submitted in accordance with Article 24(2) of Council Regulation (EU) 2015/1589 (the 'Procedural Regulation'), the scope for complaints is limited primarily to competitors. Dependent on the national law in a given Member State this could mean that a claimant who does not qualify as interested party within the meaning of the Procedural Regulation (any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations) can still have legal standing in a case concerning an alleged unlawful State aid measure before the national court. However, this cannot mean that a third party who had legal standing based on the Procedural Regulation but did not pursue proceedings on that ground would be able to contest the compatibility of a decision by the European Commission before a national court, as has been clarified in C-188/92, Deggendorf. It would be useful if the Commission could add this in point 24.
- In point 30 we suggest to add EU law does not always require a national court to disapply domestic rules of procedure conferring finality on a judgment, even if to do so would make it possible to remedy a breach of EU law by the decision at issue.
- In point 31 it could be clarified that even though the principle of *res judicata* has been limited in the field of State aid, but the Court has done so in the specific circumstances of those cases mentioned (Lucchini, C-119/05; Klausner Holz Niedersachsen, C-505/14). As regards application of the principle of effectiveness, the Court of Justice has held it must be analyzed in every case whether a national procedural provision makes the application of EU law impossible or excessively difficult. Whether the national rule regarding *res judicata* is incompatible with the principle of effectiveness was in those cases dependent on specific circumstances, such as whether an Commission decision was taken or was imminent regarding the compatibility of the aid and whether the previous court decision had the same subject-matter and concerned the State aid characteristics of the measure.
- In point 37 it could be added that the national courts may or must refer a question to the Court of Justice for a preliminary ruling, as is also explained in point 46 (of course taking into account C-188/92, Deggendorf).
- In point 43 it is stated that national courts have the power to interpret and apply articles 107(1) and 108(3) TFEU. However, concerning the interpretation of the concept of State aid only the Court of Justice has the final power to interpret article 107 (1) TFEU. National courts may determine whether a measure constitutes State aid taking into account the

interpretation of the case law of the Court of Justice. Therefore it would be more suitable to rephrase the role of national court in point 43 by solely stating that national courts have the power to apply the concept of state aid under article 107(1) TFEU.

- In point 47 and 80 it could be clarified that the fact that Commission decision does not have the effect of retrospectively regularizing implementing measures that were taken in breach of Article 108(3) TFEU does not mean that this aid needs to be recovered. It could, however, mean that illegality interest is ordered to be paid for the period that the aid was granted but no decision on compatibility by the Commission was taken yet. In this way the situation is restored to a situation where the measures were implemented in accordance with Article 108 (3) TFEU.
- Regarding point 53 and 81 it could be clarified that provisional measures in a case where after a final decision by the Commission it turns out that no aid was present, this could, depending on the national provisions, lead to a claim for damages by the recipient even though such a claim could not lead to receiving the aid itself.
- In point 62 and 69 it could be added that the provisions on existing aid in the Procedural Regulation are not binding on national courts (C-349/17, point 110).
- Point 67: Where aid has been implemented under a block exemption regulation without satisfying all applicable conditions, the recipient of this aid cannot have at that time a legitimate expectation that the granting of the aid was lawful. We would like to point out to the Commission that as a consequence of this case law the granting authorities may opt for notifying the State aid measure in order to obtain legal certainty even if on the basis of the outcome of the State aid analysis the aid could be granted under the block exemption regulation.
- The main point in point 97 should be the general rule in C-106 to 120/87, *Asteris and Others v Greece* and *EEC* that damages under national law are legally different from the concept of State aid. The first sentence in point 97 now seems to indicate that there are circumstances under which the general rule of the *Asteris* case law does not apply while this is not supported by case law. In footnote 126 a reference is made to an arbitral award concerning Intra-EU BITS's. This is very specific case while the statement in the first sentence of point 97 is quite broad and it is not clarified how the first sentence of point 97 and this footnote relates to the *Asteris* case law as referred to in the second sentence.
- In point 115 it should be added that in some instances national courts have an obligation to refer questions to the Court of Justice for a preliminary ruling, as is also explained in point 46.
- In point 138 and 139 it could be clarified that this does not mean that national courts have an obligation to notify in general but only if in their judgment they grant new aid. If it is even possible for a national court to grant new aid by way of a judgment may vary among Member States as this depends on the national procedural rules. Furthermore, the Dutch authorities ask the Commission to clarify the practical aspects of a notification by a national court as they are themselves not usually a granting authority and how this may differ from notification by (other) granting authorities, also with regard to reporting obligations on notified aid. Is it not more likely that the granting authority that has to abide by the ruling of the national court that has the obligation to notify the new aid before executing the court decision?