Työ- ja elinkeinoministeriö
Arbets- och näringsministeriet

24 February 2017 TEM/418/05.06.01/2017

European Commission
DG Competition

HT.4816

Finland's response to the public consultation by the European Commission on the Code of Best Practice on the conduct of State aid control proceedings

Background

In 2009, the European Commission issued the Code of Best Practice for the conduct of State aid control procedures (OJ 2009/C 136/04). The Code of Best Practice supplements the EU regulations on State aid procedures, especially the so called procedural regulation issued by the Council (1589/2015, codification) and the so called implementation regulation issued by the Commission (794/2004 including amendments) and related EU case law.

The aim of the Code of Best Practice is to make State aid procedures more effective and faster as well as to improve cooperation between the Commission and Member States and other parties in connection with State aid procedures. The Code of Best Practice is not binding, and procedures may deviate from it as regards individual matters. The Code of Best Practice covers the pre-notification contacts between the Member State and the Commission, the mutually agreed planning between the Commission and the Member State, the preliminary examination and the formal investigation procedure and the complaint procedures on State aid.

The Commission intends to revise the Code of Best Practice due to the recent reform of State aid rules and especially due to the changes made to the procedural regulation, taking into account the experiences gathered so far on the application of the Code of Best Practice.

Finland's Position

General points

Finland finds the Code of Best Practice to be generally useful. The Code of Best Practice supplements the EU regulations on State aid procedures and contributes to a more efficient handling of notifications and complaints and to increasing the predictability of the Commission's State aid procedures.

Finland finds it necessary for the Code of Best Practice to be revised in order to reflect the modernisation of State aid rules and especially the changes made to the procedural regulation, taking into account the experiences of the Commission, Member States and other parties regarding the application of the Code of Best Practice. In addition, Finland considers that it is justified for the Commission to take the reform of the Notice on a Simplified Procedure for the Treatment of Certain Types of Aid (OJ 2009/C 136/3) into account when revising the Code of Best Practice. As regards the reform of the Notice on a Simplified Procedure, Finland refers to the response submitted in connection with the Commission's public consultation carried out in 2016.

State aid notifications: Pre-notification contacts, preliminary examination, formal investigation procedure and mutually agreed planning

In 2009, pre-notification contacts between the Commission and Member States regarding State aid cases were included in the Code of Best Practice. In Finland's view, the pre-notification procedure has proven to be useful and functional. Especially with complex State aid matters with new features, the pre-notification phase offers the possibility to informally discuss the case between the Member State and the Commission. It also makes it possible to make necessary changes to the State aid measure in this phase if required, for example. On the other hand, Finland notes that in some cases, it could be problematic from a legal certainty point of view if the Commission's interpretations on the aid measure were only based on informal communication.

Especially in recent years and after the modernisation of the EU State aid rules, Finland has used the pre-notification procedure in most of the State aid cases falling within the scope of the notification obligation (especially with the procedures regarding the Directorate-General for Competition; less so with procedures regarding the Directorate-General for Agriculture). After the modernisation of the EU State aid rules, State aid arrangements requiring notification, and not within the scope of block exemptions, are often very complex in nature. Pre-notification is very suitable for these cases, as also the Code of Best Practice states.

In Finland's view, the greatest difficulty regarding the pre-notification procedure is related to the duration and predictability of this phase. According to the Code of Best Practice, the pre-notification contacts should last no longer than two months, although the Code states that depending on the complexity of an individual case, pre-notification contacts may last several months. In Finland's experience, the pre-notification phase has typically lasted longer than two months, varying from several months up to two years. Moreover, the first contact by the Commission after the receipt of the pre-notification has not necessarily occurred within two weeks as stated in the Code of Best Practice.

In Finland's view, it would be important for the Member State to regularly receive information on the state of handling of the pre-notification, and the predictability of the pre-notification phase should be further improved. The predictability of the process is important for the Member State authorities as well as for the aid beneficiaries. Currently, the matters within the scope of the pre-notification procedure often concern aid for an individual aid beneficiary. Thus, the Commission's State aid assessment has a central role for the operation of the enterprise.

The aim of the pre-notification phase is to make the handling of State aid notifications more efficient and to shorten the handling time of notifications. In Finland's experience, this has indeed been the case. In the preliminary examination phase of notified State aid cases, the first request for additional information has usually been received from the Commission in the timetable expressed in the Code of Best Practice (4–6 weeks), and in some cases, there has been no need for requesting additional information. On the other hand, Finland notes that the total duration of State aid procedures (pre-notification + notification) has not been any shorter on average thanks to the pre-notification procedure. The Commission's average total handling time of Finland's State aid procedures requiring notification has been about 9–10 months, but with technically difficult cases, the Commission procedure has sometimes taken considerably longer.

The Code of Best Practice recommends involving the individual aid beneficiary in the pre-notification contacts. In Finland's view, this is often useful, especially with matters that are complex in a technical or financial manner. In practice, the inclusion of the aid beneficiary is decided on a case by case basis.

According to the Code of Best Practice, the Member State uses a draft notification form to provide the Commission with the information on the aid arrangement in the pre-notification phase. It is Finland's experience that in some State aid matters, the Commission units have interpreted the preceding, informal contacts between the Commission and the Member State as a pre-notification although no draft notification form has been delivered. Even though Finland generally finds the early informal contacts with the Commission and the informal guidance provided by the Commission very useful, the line between informal contacts (for example exchanging e-mails) and the draft notification could be clearer and more unified.

Finland has not used the mutually agreed planning for State aid notifications as described in the Code of Best Practice. However, in 2015–2017, Finland has used the Commission's newly implemented so called prioritisation/portfolio procedure in two cases.

State aid complaints: Preliminary examination and formal investigation procedure

The Code of Best Practice states that the Commission endeavours to make a decision on a preliminary examination within a time frame of 12 months for priority cases, and to send an administrative letter to the complainant of a non-priority case setting out the Commission's preliminary views on the matter. In Finland's experience, this indicative time frame has not been achieved very often, and the preliminary examination of complaints has in many cases taken noticeably longer, up to several years. The duration of the formal investigation procedure concerning State aid complaints has also in many cases taken considerably longer than the endeavoured 18 months provided in the procedural regulation and the Code of

Best Practice; in Finland's experience, the handling time has often been as long as 3–5 years. The current total duration of State aid complaint procedures can therefore be seen as problematic from Finland's perspective and the aim to make the investigation procedure more effective and faster has not been achieved here. In Finland's view, even with non-priority cases, the speed and predictability of the procedure is important for the Member State authorities and enterprises.

According to the Code of Best Practice, the Member States and complainants are systematically kept informed on the closure or other processing of a complaint. In addition, the revised procedural regulation specifically states that the Member States should be kept informed when a complaint has been deemed to have been withdrawn. However, in Finland's experience, this principle has not been realised with all complaints, and informing the Member State on the processing of a complaint should be improved.

The Code of Best Practice does not determine the format to inform the Member State on the closure of a complaint when the Commission closes the case with an administrative letter. From Finland's perspective, it would be important for the Member State whose authorities the complaint concerns to be informed by the Commission of the closure of a complaint but also to receive sufficient information on the grounds on which the Commission has decided to close a case. Receiving information on the grounds for assessing a complaint would improve legal certainty for the Member State authorities and the complainants. The matter under complaint may for example be simultaneously involved in national legal actions. It must also be noted that even complaints that are closed with an administrative letter by the Commission after the preliminary examination procedure may be significant and complex for the Member State.

Language waivers

In nearly all State aid cases, Finland has used English for informal contacts with the Commission and during the pre-notification phase. In some cases, Finland has also made notifications in English, especially with urgent matters. However, in significant and/or complex State aid cases, using a Commission working language instead of an official language of the Member State may not be the best option for the Member State. In Finland's view, the Member State should be able to make decisions concerning the procedural language on a case by case basis, with always having the right to use its official language(s). In addition, choosing the procedural language should not affect the Member States' right to receive the Commission's decision in their official languages.

New topics to be considered in the Code of Best Practice

In Finland's view, the review of the Code of Best Practice should naturally factor in the changes made to the procedural regulation (1589/2015) - concerning complaints, such as the mandatory use of a complaint form; requests for information to other Member States and undertakings during the formal investigation procedure concerning market information; investigations into sectors of the economy and into aid instruments across Member States.

In addition, Finland considers it important for the Code of Best Practice to include the procedures concerning the *ex post* monitoring of State aid, for example the general principles of targeting monitoring, the stages of monitoring, the approximate duration of the procedure and the format of the closure of the

procedure. This is especially necessary since the significance of monitoring has increased due to the State aid modernisation and especially due to the expanding the scope of application of the General Block Exemption Regulation.

In Finland's experience, the duration of monitoring procedures has varied significantly case by case, and Finland has not in all cases received information regularly about the status of the procedure. In addition, it can be noted that the administrative letters on the closure of the Commission's monitoring procedure have not always been very informative for the Member State. On the other hand, the information requests sent to the Member State authorities have been quite extensive, often including complex questions, requiring the Member State to gather a large amount of information and documents.

In Finland's view, it would also be useful if the Code of Best Practice combined the principles of mutually agreed planning already in the Code and the principles concerning the so called portfolio procedure implemented by the Commission since 2015 that concerns the Member States' bi-annual opportunity (in September and January) to propose the prioritisation of their State aid notifications to the Commission. Finland has had positive experiences of the portfolio procedure, as the State aid cases chosen for the procedure have been handled in a systematic manner, and the Commission decision has been made during the suggested six-month period.