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New Code of Best Practices for State Aid Procedures

Thomas Wilson (Kirkland & Ellis, Belgium) · Friday, August 10th, 2018

On 16 July 2018, the EU Commission (EC) adopted its “Code of Best Practices for the conduct of State aid control procedure” ([Best Practices](#)). The Code replaces the Notice on a Code of Best Practices adopted in 2009 (2009 Code) and integrates the Simplified Procedure Notice of 2009.

Over recent years, the EC has implemented a State aid modernization agenda (SAM) with the aim of focusing State aid control on measures which genuinely affect competition in the internal market, while at the same time simplifying and streamlining rules and procedures. The Best Practices give guidance on how the EC, Member States and other stakeholders work together in State aid procedures. The guidance is more detailed than the 2009 Code, in particular on practical aspects, timelines and cooperation between the EC and Member States. It is as a helpful guide to Member States, companies and practitioners in State aid cases. Please see below for an overview of the key changes of the Best Practices compared to the 2009 Code.

Pre-Notification

The Best Practices provide guidance that is more detailed than the 2009 Code:

- The EC strongly recommends to use the pre-notification phase for cases with *novel aspects, features or complexity*. Pre-notification discussions can also be useful for *projects of common interest with high EU relevance*, e.g. the Trans-European Network for Transport (TEN-T).
- For particularly complex cases the EC recommends that the Member State initiates pre-notification contacts *as early as possible*. The pre-notification contacts should, however, *not last longer than 6 months* (the old guidance generally assumed 2 months).
- As was the case under the old Code, in cases with major technical, financial and project-related implications, the EC recommends *involving beneficiaries of individual measures* in the pre-notification phase. The Best Practices additionally make it clear that the decision of whether to involve the beneficiary in the pre-notification contacts lies with the Member States.

Mutually Agreed Planning (MAP)

The MAP tool (which already existed under the old code) can be used to increase the transparency and predictability of the duration of a State aid investigation. It allows the EC and the Member

State to agree on an expected timeline of an investigation in a specific case (and in some cases on the likely course of the investigation). These are normally cases with very novel aspects (e.g. related to TEN-T core network projects), technically difficult or otherwise sensitive ones. The MAP can take place either at the end of the pre-notification phase or at the beginning of the formal investigation phase.

The Best Practices now provide for a *case portfolio approach* the purpose of which is that the Member State informs the EC for planning purposes which of its cases has low or high priority. Such case portfolio exercise is offered to the Member States *twice a year*.

Streamlined Procedure in Straightforward Cases

The Best Practices provide details on the possibility of a *streamlined procedure* for cases which are unlikely to distort competition.

- A measure may qualify for a streamlined procedure if it is *sufficiently similar to other measures* that were approved in at least 3 EC decisions in the last 10 years. With regard to the “sufficiently similar” test the EC will look at substantive and procedural conditions of the measure, including the objectives and overall set-up of the measure, the types of beneficiaries, eligible costs and individual notification ceilings.
- The EC will only accept a streamlined procedure if pre-notification has taken place and the notification form is, in principle, considered to be complete (standard notification forms are to be used pursuant to Annex I of the Implementing Regulation).
- After the EC has received the notification, interested parties have *10 working days* to comment following the publication of a summary of the notification on DG COMP’s website. If an interested party raises concerns, which seem *prima facie* well founded, the EC will switch to the normal procedure.
- The EC will “endeavour” to adopt a short-form decision within *25 working days* from the date of notification (para 45; note that para 37 of the Best Practices speaks of “25 days”). The EC’s short-form decision will contain (i) the summary published at the time of the notification, (ii) a short assessment of the measure under Article 107(1) TFEU and (iii) that the measure is in line with the EC’s previous decision-making practice (if applicable).

Formal Investigation Procedure

This section of the Best Practices remains largely unchanged. It additionally mentions:

- The EC’s power to conduct *sector inquiries* if there reasonable suspicion that State aid measures may materially restrict competition (Article 25 of the Procedural Regulation). The EC will at the end of such inquiry publish a report on the results of the investigation and give Member States and other parties concerned the opportunity to comment within *1 month*. The information obtained through the sector inquiry can be used by the EC in State aid procedures.
- The EC can, based on EU case law, issue *information requests to sources other than the Member State* after the initiation of the formal investigation procedure.
- The EC will send the Member State a non-confidential version of the comments received from interested parties to which the Member State can reply within *1 month*.

Formal Complaints

The part of the Best Practices on formal complaints provides more detailed guidance for the complainant as to the process of filing a complaint and the rights of the complainant in case of unlawful aid before national courts. Otherwise the Best Practices are largely in line with the 2009 Code (including on the indicative time frame for the investigation).

Evaluation Plans

- The EC encourages an *effective ex post evaluation of aid schemes* which could lead to substantial distortions of competition (incl. those schemes with large budgets or novel characteristics); the EC will decide in the pre-notification phase whether such evaluation is necessary.
- For schemes that must be evaluated on the basis of the GBER the Member State must notify the EC within *20 working days* from the scheme's entry into force – the EC will approve the scheme as soon as possible.
- For notified schemes that must be evaluated the Member State must submit its evaluation plan to the EC *at the time of the notification* – the EC's decision will cover both the plan and the scheme.

Monitoring of Aid Schemes

The Best Practices contain guidance on the monitoring of existing or exempted aid schemes.

- The EC has set up an *annual monitoring process* during which a EC selects a sample of State aid cases for further scrutiny (as under the GBER Member States have greater possibilities to grant aid without notifying it to the EC).
- The EC obtains the necessary information for the monitoring process through information requests; they normally have to be answered by the Member State within *20 working days*.
- The EC “*tries*” to complete the monitoring within *12 months* from the first information request issued.

Cooperation with Member States

- The Best Practices recognize that – since SAM – cooperation between the EC and Member States has become *more important*.
- *Working groups* have been set up which include representatives from the EC and the Member States; these groups meet *on a regular basis*.
- A *network of country coordinators* has been installed for the day-to-day contact with the Member State – the country coordinator serves as a contact point for Member States when reaching out to the EC on the handling of cases and other aspects of the application of State aid rules.
- The EC is willing to give informal guidance to the Member States on the new State aid rules and training sessions.

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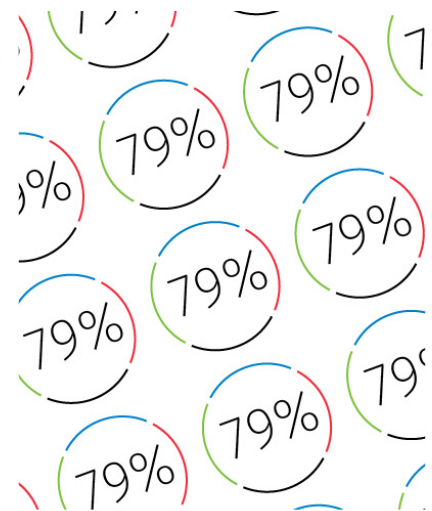
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