The Hague, 6 March 2019

Response of the Dutch authorities to the draft Communication Notice on the recovery of unlawful and incompatible State aid
HT. 5261

This response reflects the views of the Dutch 'Interdepartementaal Steun Overleg (ISO)'. The ISO is a central State aid coordination body composed of all Dutch ministries and representatives of the regional and local authorities.

General points

The Netherlands understands that recovery is the necessary corollary of the general prohibition of State aid established by article 107 (1) of the Treaty of the Functioning of the European Union ('TFEU') . Fair competition is impossible without recovery of illegal State aid to restore the situation which existed in the internal market before the aid was paid. The Netherlands has a national law ('Wet terugvordering staatssteun'; Recovery Act State aid) for the recovery of unlawful and incompatible aid, providing a legal basis to recover illegal State aid for all the Dutch public authorities. So recovery injunctions or recovery decisions of the Commission can be implemented effectively and immediately. To that end the Recovery Act State aid has centralized the recovery-related litigation before two (specialized) national courts.

We welcome the draft Commission notice on the recovery of unlawful and incompatible State aid. However we do have some comments on this revision.

Recovery of illegal State aid granted through tax advantages could have very complex consequences in international situations when - for example - tax treaties apply and the ability of the national tax authorities to levy tax in other countries is limited or impossible. We would welcome more guidance and certainty from the Commission with regard to these issues.

In the Dutch decentralized institutional set-up, every State aid granting authority has to comply with the Union acquis, including State aid provisions in the TFEU. A special entrusted central body entrusted with the task of controlling and overseeing the recovery process, would not fit in with the own responsibility of the local or regional granting authorities.

The Commission states that in its experience proceedings before administrative courts, where available, tend to guarantee a faster enforcement of recovery orders than proceedings before civil courts. The Netherlands assumes that this does not influence the right of each Member State to choose its own legal proceedings for recovery-related litigation in accordance with the principle of procedural autonomy.

1. General principles

Does the Commission consider adding article 106 (2) TFEU in footnote 13 in relation to the Commission Decision of 20 December on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of **public service compensation** granted to certain undertakings entrusted with the operation of services of general economic interest ?

Could the Commission substantiate in what cases or circumstances it would issue a recovery injunction without having examined the compatibility of the aid with the internal market under the procedure of article 108 (2) TFEU ? (footnote 16)

2. The principles of sincere cooperation

In point 23 the Commission states that the Commission may elaborate on the standard of proof and the type of evidence required for the Member State to determine, among other things, the identity of the aid beneficiaries . Could the Commission acknowledge that this does not create or alter any right or obligation for the Member States compared to those laid down in the TFEU, the Procedural Regulation and the Implementing Regulation ? And that this does not create new competences for the Commission as compared to those laid down in the TFEU or Procedural Regulation ? In particular in the field of (direct) taxation it is important that the Commission acknowledges that Member States and national tax authorities do not have the competence to recover illegal State aid in the form of a tax measure if the alleged beneficiary is not liable to tax in the Member State.

In point 24 the Commission states that recovery of State aid cannot be regarded as an unjust enrichment for the Member State concerned since it merely provides for the restitution of an amount that should not have been paid to the beneficiary. How does the Commission substantiate this for other forms of State aid such as guarantees which provide for an interest advantage on a regular loan?

General principles of Union law

Could the Commission provide for jurisprudence when it states that (point 30) general principles of Union law are subject to a restrictive interpretation in the context of State aid recovery policy?

The principle of the protection of legitimate expectations

Recovery of illegal State aid can – in certain circumstances and under particular facts – be contrary to a general principle of Union law. For Member States as well as beneficiaries it is important to have legal certainty, in particular in cases in which the Commission overrules an earlier decision from the Commission finding certain measures not constituting State aid. Could the Commission elaborate this more in the text of point 39 and not only in footnote 46?

The principle of res judicata

Point 41 the Commission points out that the principle of res judicata cannot preclude the recovery of State aid. Does the Commission mean that this holds true for definitive judicial rulings by national courts ? Could the Commission clarify that the principle of res judicata of a final judicial ruling of the EU Court of Justice can be an obstacle to the recovery of illegal State aid ?

3. The role of the Member State and the Commission

Could the Commission clarify the role of the Commission when it comes to providing accurate requests for information in the course of the formal investigation ?

In point 68 the Commission states that some Member States have entrusted a central body with the task of controlling and overseeing the recovery process. The Commission seems to be in favour of such a central coordinating body. The Netherlands is of the opinion that it is up to the Member States to decide on such a central coordinating body, as this is in accordance with the procedural autonomy of the Member States in the field of recovery of State aid. Furthermore it is important to point out that national courts do play an important role in the field of recovery of illegal State aid. This role of the national courts should be acknowledged in this respect.

4. Implementing the recovery decision

Could the Commission give examples of difficulties which would justify an extend of the recovery deadline? Experience of the Netherlands shows that this recovery deadline is often unrealistic and too short to be met, especially in more complicated tax measures cases.

In point 77 the Commission points out that it must adopt a new decision in order to extend the recovery deadline. What would be the legal basis of such a decision, could the Commission clarify this, preferably with a reference to the Procedural Regulation ?

Kick-off meeting

In point 78 the Commission mentions the kick-of meeting in order to facilitate and accelerate the recovery process. The Netherlands assumes that this kick-off meeting is not compulsory (as stated in point 81) and that not participating in this kick-off meeting does not influence in anyway the rights and obligations of the Member State or the Commission under the Procedural Regulation. It should be up to the Member State to decide whether or not it wants to participate in such a kick-off meeting.

Identification of the aid beneficiary belonging to a group of undertakings

In point 85 the Commission states that, where certain transactions occurred within a group of undertakings, the Commission may still limit the scope of recovery to only one aid beneficiary within the group.

Could the Commission provide jurisprudence of the Union courts which allows for abovementioned limitation of the scope?

Furthermore, we have noticed that in some decisions regarding State aid through tax advantages the Commission stated that the state aid could also be recovered from other companies of the group. This seems to be inconsistent with point 85.

Quantification of the amount to be recovered

In points 99 and 100 the Commission explains that it requires the Member State to recover all aid, unless at the time it was granted the aid met the applicable requirements established by a Block Exemption Regulation or the the minimis Regulation or a different previous decision of the Commission.

The Netherlands welcomes this clarification, it improves legal certainty for Member States as well as beneficiaries.

Could the Commission in this respect accept the retrospective application of the GBER when the Member State did not comply with the procedural requirements of the GBER, especially articles 9 and 11 (a) of the GBER in relation to the 20 days/6 months deadlines? We refer to the Dilly's Wellness ruling of the Court of Justice (21 juli 2016, C 493/14)

Tax measures

Point 108 points out that pursuant to national law, in order to collect tax amounts (including State aid granted in the form of tax advantages) the tax authorities of the Member State concerned might have to carry out internal tax audits prior to the actual recovery.

How should point 108 be read since the Commission has no competence in the field of internal tax audits of the Member States.

The publication by the Commission of the amount recovered is a sensitive issue in tax cases from the Dutch point of view. All information regarding the taxes paid is, based on the national law, confidential. The Commission has therefore agreed to inform the Dutch authorities before a possible publication of recovered amounts of taxes. We would welcome a formalization of this agreement in the Communication Notice on the recovery of unlawful and incompatible State aid.

5. **Litigation before national courts**

In order to safeguard the legal rights of the beneficiaries the national courts play an important role in recovery-related litigation. This role seems not to be reflected in chapter 5 of the revision of the Recovery Notice. Could the Commission focus more on the principle of procedural autonomy in relation to point 142 ?

It must be borne in mind that, in accordance with settled case-law, in the absence of pertinent provisions of European Union law, the recovery of aid which has been declared incompatible with the internal market is to be carried out in accordance with the rules and procedures laid down by national law, in so far as those rules and procedures do not have the effect of making the recovery required by

European Union law practically impossible and do not undermine the principle of equivalence with procedures for deciding similar but purely national disputes (see Case C-382/99 Netherlands v Commission [2002] ECR I-5163, paragraph 90). Disputes arising in connection with the enforcement of recovery are a matter for the national court alone (see, to that effect, the order in Case C-297/01 Sicilcassa and Others [2003] ECR I-7849, paragraphs 41 and 42).

Could the Commission focus also on the possibility that an ex officio recovery order is given by the administrative or civil national court in relation to the principle of procedural autonomy?

Points 140-144 refers to some jurisprudence of the Union courts. Could the Commission under these points also refer to Mediaset (judgment of the Court of Justice of 13 February 2014, C-69/13) ? We find it important that the EU Court of Justice ruled that national courts have – under certain circumstances – a discretion in determining the amount of aid.

Accordingly, and without calling into question the validity of the Commission's decision or the obligation to repay the aid declared unlawful and incompatible with the internal market, the national court may fix an amount of aid equal to zero to the extent that that determination follows directly from the quantification of the sums to be recovered.