The Hague, 17 June 2020

HT 5833

Response of the Dutch authorities on the draft Communication from the Commission to the

# 3rd Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak

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

**1. General remarks**

The Dutch authorities would like to thank the European Commission for its work on the extension of the Temporary Framework. With this third amendment the Commission is  proposing to further extend the scope of the Temporary Framework by enabling Member States (i) to support certain micro and small enterprises, including start-ups that were already in difficulty before 31 December 2019, and (ii) to provide incentives for private investors to participate in coronavirus-related recapitalisation measures. We support these proposals, however we do like to raise  the following issues.

**2. Specific remarks**

*Remarks concerning micro and small undertakings*

The Commission considers it appropriate to include under the Temporary Framework State aid to all micro and small undertakings, even if they would fall under the category of an undertaking in financial difficulty[1] on 31 December 2019, provided that they are not subject to collective insolvency procedure under national law and that they have not received rescue aid (which has not been repaid) or restructuring aid (and are still subject to a restructuring plan). Given their limited size and limited involvement in cross-border transactions, the Commission considers that State aid to micro and small undertakings is less likely to distort competition in the Internal Market and affect intra-EU trade than State aid to medium-sized and large companies.

The Netherlands can follow the Commission in its reasoning that this kind of state aid to micro and small undertakings is less likely to distort competition and therefore can support this amendment.

The Netherlands hopes this amendment will also effectively increase the possibilities to support **start-up and scale-up companies**, especially innovative ones which may be loss-making in their high-growth phase, which are crucial for the economic recovery of the Union. We would like to suggest to take into consideration whether this amendment of the TF should also be possible for startups and scale-ups that are no longer micro or small undertakings and whether it would be more suitable in

[1] As defined in the General Block Exemption Regulation, i.e. Article 2 (18) of the Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187 of 26.6.2014, p. 1.

those cases to take into account the age and sector of the company in order to determine whether it can qualify as a start-up or scale-up .

We do like to raise the issue that the definition of the undertaking in difficulty should be under review anyhow. The future state aid framework must not hinder economically sound undertakings from receiving aid because of suboptimal definitions, which is the case today. The "undertaking in difficulty" definition continue to cause problems for our granting authorities. While we agree with the concept of excluding failing firms from most forms of state aid except for Rescue and Restructuring aid, the definition itself contains criteria, some of which have the unfortunate side-effect of excluding economically healthy undertakings from receiving aid, although – from an economic point of view – they should not to be considered as an "undertaking in difficulty".

*Remarks concerning the wage costs of undertaking*

In paragraph 42 the proposed revision stipulates that "those schemes shall be considered to provide undertakings with a selective advantage, if they are restricted to certain sectors, regions or types of undertakings". This presumption is however not in line with the standing case law of the ECJ which allows for regional material selectivity (Case C-88/03, Azores). Moreover this revision does not incorporate the discretionary powers the Member States enjoy in determining material selectivity according to the standards on the reference systems for general applicable measures as was set out in the ECJ judgments Commission vs Hansestadt Lübeck (C-524/14) and ANGED (C- 233/16) in which the ECJ declared that general applicable measures with a regional scope do not per se have a selective nature if they meet the conditions of excluding material selectivity

*Remarks concerning the recapitalisation measures for State equity injections*

In point 64 an addition is included making clear that if the State sells its equity stake at a price below the minimum price laid down in point 63, the governance rules laid down in section 3.11.6 shall continue to apply at least until four years after the COVID-19 equity injection measure was granted.

Point 63 determines that the beneficiary should be able to buy-back the equity state that the State has acquired and this buy-back price should be the higher amount of either the nominal investment by the State increased by an annual interest remuneration 200 bp or the market price. This addition makes it possible to sell at a price below these minimum prices. However it does not make a difference between a buy-back price of - for example - zero euro's or a discount of – for example – 10% of the nominal investment. Could this lead to too much state aid ? Could the Commission clarify whether it plans to supervise the buy back conditions ?

In point 78 an adaption clarifies that the applicable limit for the remuneration of each member of the beneficiaries'management is the fixed remuneration of the members of the management with the same level of responsibility on 31 December 2019. We support this adaption.

Point 78bis en 78ter are new and determine that where the State is an existing shareholder before the COVID-19 equity injection and wants to inject new equity under the same conditions as private investors while the private participation is significant:

- A. the step-up mechanism increasing the remuneration of the State is not applicable;
- B. the acquisition ban and the cap on the remuneration of the management are limited to three years;
- C. the dividend ban is lifted for the holders of the new shares, while for the existing shares the dividend ban is lifted provided the private holders of those existing shares

are altogether diluted to below 5% in the company. The remuneration due for COVID-19 hybrid capital and subordinated debt instruments held by the State shall be paid before any dividends are paid to shareholders in a given year;

D. there is no need to notify a restructuring plan after six years; while

- E. the other conditions on amount of the recapitalisation, the remuneration and exit of the state and governance and prevention of undue distortions of competition stay applicable.

The more stringent conditions of title 3.11 of the TF stay applicable where the State injects equity into a company in which it is not an existing shareholder (*i.e.* before the COVID-19 equity injection measure) while it injects new equity under the same conditions as private investors, and the private participation is significant . In that case only the dividend ban is lifted for all holders of new shares. For existing shares, the dividend ban is lifted, provided the private holders of such existing shares are altogether diluted to a share in the company below 5%. In any event, the remuneration due for COVID-19 hybrid capital and subordinated debt instruments held by the State shall be paid before any dividends are paid to shareholders in given a year.

While we in general support these adjustments, we do like the Commission to clarify the difference in treatment between the situation in which the State is an existing shareholder and the situation in which the State is not an existing shareholder. We do like to recall that for the Netherlands it is essential that the concept of the notion of state aid is not changed and that the MEOP principle is still upheld by the Commission. Could the Commission acknowlegde this in the new text ? Could the Commission also clarify what is meant by 'the State's new equity injection constitutes State aid because of *its particular circumstances* ' ?

78bis and 78ter govern the situation where the state is already an existing shareholder. Do these conditions also apply to the case where the state already owns 100% of the shares? In that case, it is not obvious that private equity injections will constitute at least 30% of the new equity injected. If the newly inserted points do not apply to the case where 100% of the equity is owned by the State already , could the Commission clarify why that is the case? It seems that the considerations for the newly inserted points, are also logical to apply for SOE's which the state already fully owns (and where the 30% private contribution cannot be met).

The dividend ban is lifted for the holders of the new shares. For existing shares, the dividend ban is lifted, provided the private holders of those existing shares are altogether diluted to below 5% in the company. Could the Commission clarify whether in practice it would be a problem to make a difference in the treatment of (existing or new) shareholders concerning the lifting of the dividend ban ?

*Remarks concerning point 86 on transparency requirements*
The Netherlands is in favour of introducing transparency requirements on aid that is granted under the Temporary Framework, although we call for the introduction of a threshold in paragraph 86 of the current Temporary Framework to reduce the administrative burden of Member States.