

The Hague, 30 March 2020

Response of the Dutch authorities on the draft amendments 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

In general, the Netherlands supports the extension of the Temporary Framework under Article 107(3)(b) TFEU, to facilitate COVID-19 relevant research and development and to support the setting up of additional capacities for the production of products needed to respond to the outbreak as well as for the construction and upgrade of testing facilities of COVID-19 relevant products. Also, the Netherlands welcomes the clarifications by the Commission on the application of the existing Temporary Framework.

2. Specific remarks

The Netherlands would like to raise the following issues:

Marginal 15 (related to section 3.6 – Aid for COVID-19 relevant research and development)

- The Netherlands welcomes the new framework for Covid-19 related investments in research and development.
- However, the Netherlands would like to raise its concern on the formulation of the requirement in new point 35 subparagraph (g) that the "aid beneficiary must commit to grant non-exclusive licences under non-discriminatory market conditions to third parties in the EEA". In our view, this requirement is too weak. Within the current market conditions, in which market prices for Covid-19 related product licences may soar, this could still allow aid beneficiaries to demand an unreasonable high price for their licences.
- We would like to ask the Commission to consider possibilities to avoid that potential buyers need to pay unreasonable market prices for licences/end-products that have been developed with high shares of public financing. We would like to suggest the following replacement: 'aid beneficiary must commit to grant non-exclusive licences under non-discriminatory, fair and reasonable conditions to third parties in the EEA'.
- We assume that public financing of independent research is still free of state aid, as mentioned in point 31 of the notion of state aid:

In the light of the principles set out in paragraphs 28, 29 and 30, the Commission considers that certain activities of universities and research organisations fall outside the scope of the State aid rules. This concerns their primary activities, namely: (a) education for more and better skilled human resources; (b) the conduct of independent research and development for more knowledge and better understanding, including collaborative research and development; (c) the dissemination of research results.

- In point 35, under d, the Commission suggests that the aid intensities for industrial research and experimental development are capped on 75 %. Could the Commission consider higher aid intensities in the case of aid beneficiaries being hospitals, nursing homes, hospices or rehabilitation centers ?

Marginal 16 (related to section 3.7 – Aid for resting and upgrading infrastructures)

- The Netherlands welcomes the new framework for investment aid for the construction or upgrade of testing and upscaling infrastructures required to develop, test and upscale, up to first industrial deployment prior to mass production of COVID-19 relevant products as outlined in section 3.8.
- The Netherlands would like to ask for clarification whether the list of Covid-19 relevant products in subparagraph a of new point 37 is exhaustive. Also, we would like to ask the Commission to further specify the list by e.g. introducing CPV-codes and/or customs codes.
- The Netherlands is critical towards the possibility under new point 37 subparagraph (b) to grant aid in the form of loss cover guarantees. We do support aid that aims to minimize the financing-risk and to provide pre-financing; however, the loss cover guarantee instrument seems to give a *carte blanche* to ill-performing companies. We are especially concerned about subparagraph (h), as it gives very little assurance that we are not rescuing ill-performing companies through loss cover guarantees. Therefore, the Netherlands would be in favour of deleting the possibility to use the instrument of loss cover guarantees under section 3.7, as direct grants and repayable advances in combination with section 3.4 should be sufficient to realize the desired effect.

Marginal 17 (related to section 3.8 – Investment Aid for the production of COVID-19 relevant products)

- The Netherlands welcomes the new framework for investment aid for the production of COVID-19 related products.
- The Netherlands would like to ask for a clarification on how marginal 16 and 17 are interrelated, as there seems to be overlap.
- Furthermore, the Netherlands asks for the introduction of a definition on the type of investment aid that can be granted (e.g. similar to the definition of investment under regional aid frameworks).
- The Netherlands would like to repeat its concern on the use of loss cover guarantees as expressed under marginal 16: The Netherlands is critical towards the possibility under new point 40 subparagraph (b) to grant aid in the form of loss cover guarantees. We do support aid that aims to minimize the financing-risk and to provide pre-financing; however, the loss cover guarantee instrument seems to give a *carte blanche* to ill-performing companies. We are especially concerned about subparagraph (h), as it gives very little assurance that we are not rescuing ill-performing companies. We would be in favour of deleting the possibility to use the instrument of loss cover guarantees under section 3.8, as direct grants and repayable advances in combination with section 3.4 should be sufficient to realize the desired effect.
- The Netherlands would like to call for the introduction under this Temporary Framework for state aid to e-health care providers. It should be possible to provide subsidies for activities in the context of the purchase, lease and implementation of e-health applications that contribute to the continuity of support or remote care for clients living at home during the COVID-19 outbreak or to the obstacles resulting from this crisis can be resolved. Due to the COVID-19 outbreak providers of social support services and long-term care services at home need to find new ways to ensure the continuity of these services. The measures of social distancing and quarantine ask for a different approach: support and health care at home, but with physical distance and restricted physical contact. Therefore, there is an increasing demand in the implementation of e-health applications in order to provide these services from a distance.

Marginal 18 (section 3.9 Aid in form of tax deferrals and/or suspensions of employers social security contributions)

- Deferrals of payment of taxes and social security contributions can be a valuable tool to reduce companies' liquidity constraints and preserve employment. Where such deferrals apply to the whole economy, they fall outside the scope of EU State aid control. If they are restricted for example to certain sectors, regions or types of companies, they involve aid within the meaning of Article 107(1) of the Treaty.
- The Netherlands would welcome clarification or confirmation that the Commission is applying the general principles of selectivity as used in the jurisprudence of the EU courts, like the Lübeck airport judgment (C-524/14P Commission vs Hansestadt Lübeck).
- To fall within the scope of Article 107(1) of the Treaty, a State measure must favour 'certain undertakings or the production of certain goods'. Hence, not all measures which favour economic operators fall under the notion of aid, but only those which grant an advantage in a selective way to certain undertakings or categories of undertakings or to certain economic sectors. Measures of purely general application which do not favour certain undertakings only or the production of certain goods only do not fall within the scope of Article 107(1) of the Treaty
- The Netherlands assumes that tax deferrals which apply to all undertakings in a member state which are affected by the COVID-19 outbreak is considered to be a general measure, as it applies 'to the whole economy'. The fact that undertakings in a member state which are *not* affected by the COVID-19 outbreak, not fall under this tax deferral, doesn't mean that this tax deferral constitutes state aid.
- Punt 44 C) mentions that "the wage subsidy is granted upon the aid application, over a period of not more than twelve months".
- Concerning the amendment in point 44 c: Should the 12 month - period for granting wage subsidies be calculated from the moment that this amendment is adopted by the Commission, or does this period end at 31 December 2020, in comparison to the standing COVID-19 - aid instruments under the current Temporary Framework?

Marginal 20 (new point 45 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 34 of the current Temporary Framework. However, we would like to express our concern on the administrative burden that such a transparency requirement would have on aid granted under section 3.9 and 3.10 (aid in the form of tax deferrals/suspension of employers' social security contributions/ wage subsidies for employees). We are also concerned that such a transparency obligation is incompatible with fiscal law / protection of data rights. Therefore, the Netherlands would like to call for an exemption of the application of new point 45 to aid under section 3.9 and 3.10.