

Leaving Coherence Instruments Unapplied

The Case of Advice from the European Commission in State Aid Procedures
Before Dutch Courts

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Abstract

National courts have an important but difficult role to play in the area of State aid law. To lighten their tasks and improve the coherent application of the State aid rules, national courts can, amongst others, seek advice from the European Commission. On the basis of almost ten years of Dutch case law, this contribution examines why generally very few questions are referred to the Commission, which questions are asked and how answers are incorporated in the final judgment. Based on this case law, and drawing from the experiences in the area of competition law and expert advice in courts generally, the contribution outlines the factors that may deter national courts from seeking advice from the Commission in State aid cases. It is argued that, in theory, the possibility of referring questions to the Commission may serve as a useful instrument to ensure the coherent application of the State aid rules. However, good reasons exist (though not in all cases) for this instrument to be under-used in practice.

I National Courts in State Aid Proceedings and Coherence Instruments

For a long time now, the enforcement of the European rules on State aid has been the joint task of the European Commission and national courts. Just as the Commission, national courts may be called upon to determine whether a given measure qualifies as State aid within the meaning of Article 107(1) TFEU and whether it should have been suspended on the basis of Article 108(3) TFEU pending notification with the Commission. If so, they must attach the necessary consequences to that fact.

This is no easy task. For instance, courts have to apply the concept of State aid – an EU concept interpreted autonomously by the Court of Justice of the European Union (hereinafter: CJEU). It is a famously difficult concept to work with, the legal aspects usually being intimately intertwined with the specific

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factual circumstances of the case and often requiring intricate and detailed analyses as well as economic expertise.¹ If one considers that in countries such as the Netherlands, there is no specialized State aid judge or State aid authority, it should come as no surprise that national courts can struggle to determine whether certain contested measures qualify as State aid and have been carried out in breach of the standstill obligation. This alone may lead to undesirable divergences in the application of the State aid rules.

One way of ensuring the coherent application of the State aid rules before national courts is of course the possibility (and sometimes obligation) to refer preliminary questions to the CJEU. However, there is also another coherence instrument, which already existed previously in the area of competition law:² courts may seek information or opinions from the Commission itself. Under certain circumstances the Commission may even provide such information or advice of its own motion.³ This is an instrument worthy of some attention. While the Commission cannot provide a final and binding interpretation of the State aid rules, there may nevertheless be cases where national courts find it useful to benefit from its experience and expertise and the information in its possession, with the added advantage of receiving an answer within a far shorter time than is to be expected in a preliminary reference procedure. What is more, information from the Commission may be very necessary in cases where an alleged aid measure has been brought to the attention of both the Commission and a national court. The possibility to receive advice from the European Commission thus does not only potentially impact the coherent application of the EU State aid laws between the different Member States' courts, but also the coherent application of those laws between the national courts and the Commission.

The purpose of this contribution is to examine how the coherence instrument by which national judges can request the Commission's advice in State aid cases is applied by national courts. On the basis of almost ten years of Dutch case law,⁴ it explores whether this instrument is used in practice, what may be

¹ A.W.H. Meij, 'De rol van de nationale rechter en de Commissie op het gebied van staatssteun', in: W. den Ouden (Ed.), *Staatssteun en de nationale rechter* (Deventer 2005); P.C. Adriaanse, *Handhaving van EG-recht in situaties van onrechtmatige staatssteun* (Deventer 2006); J. Derenne, A. Müller-Rappard & C. Kaczmarek (Eds), *Enforcement of EU State Aid Law at National Level 2010* (Berlin 2010).

² See in that regard: K. Wright, 'The European Commission's Own "Preliminary Reference Procedure" in competition cases' [2010/6] *ELJ* 736-759.

³ These instruments will be elaborated further in para. 3. Another coherence instrument in State aid cases that will not be discussed in this contribution is the use of soft law. The most important example is the Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, which at the time of writing is still pending formal completion.

⁴ The core of this contribution rests on the analysis of Dutch case law as published on the website www.rechtspraak.nl, in which the search term 'staatssteun' or 'staatsteun' appears (two possible spellings of the term 'State aid'). These include judgments by the several civil, administrative and tax courts. The research includes judgments given from 1 November 2005 to 28 September 2015.

reasons for applying or disregarding it, and how Commission opinions or information are incorporated in the Dutch courts' final judgments. The central argument of this contribution is that the possibility of referring questions to the European Commission may serve as a useful instrument to ensure the coherent application of the State aid rules in theory, but that good reasons exist (though not in all cases) for this instrument to be used less than one might expect.

This contribution is structured as follows: after devoting some words to the relation between the European Commission and the national courts in State aid cases (section 2), it describes the specific coherence instrument that is the focal point of this contribution (section 3). The next paragraphs analyse the Dutch case law in which an opinion has been sought (section 4), information has been requested (section 5) or no opinion or information has been requested where this might have been expected (section 6). Some conclusions are drawn in section 7.

2 The Relation Between the European Commission and the National Courts in State Aid Cases

The relation between the European Commission and the national courts in State aid cases is an interesting one. Firstly, of course, the European Commission is an administrative body whereas the national courts form part of the judiciary. It is the national court that must provide effective legal protection and remedies to those whose rights and freedoms are guaranteed by EU law.⁵ The Commission on the other hand, as one of the EU institutions, is tasked with ensuring the application of the Treaties and of the measures adopted by the institutions pursuant to them.⁶ To put it differently, the national courts and the European Commission are clearly situated on different axes of the *triaspolitica*.⁷ Still, they both perform very important and sometimes overlapping roles in the enforcement of the European State aid laws. The CJEU has frequently reiterated that the Commission and national courts fulfil complementary and separate roles.⁸ On the one hand, the national courts must, given the direct effect of Article 108(3) TFEU, offer to individuals the certain prospect that appropriate conclusions will be drawn from an infringement of that provi-

⁵ See Art. 19 TFEU, Art. 47 CFR. Consider also Art. 6 ECHR.

⁶ Art. 17(1) TFEU.

⁷ See K. Wright, 'The European Commission's Own "Preliminary Reference Procedure" in competition cases' [2010/6] *ELJ* 736-759.

⁸ See for instance Case C-39/94 *SFEI* [1996] ECR I-3547, para. 41; Joined Cases C-261/01 and C-262/01 *Van Calster and Cleeren* [2003] ECR I-12249, para. 74, and Case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-9957, paras 36 and 37.

sion.⁹ On the other, the Commission is exclusively competent to determine whether an aid measure is compatible with the internal market and can order the recovery of aid in situations where it is not.¹⁰

Both the Commission and the national courts might find it necessary in a State aid dispute to determine whether a certain measure qualifies as aid in the sense of Article 107(1) TFEU, subject ultimately to review by the CJEU. Once the Commission has taken a final decision on the State aid nature of that measure, however, that decision binds the national court on the basis of Article 288 TFEU. The fact that the Commission can take such a final decision¹¹ does not mean that national courts can simply stay the national State aid proceedings in a matter that is also subject to the Commission's examination. The initiation by the Commission of an examination procedure does not release national courts from their duty to safeguard the rights of individuals in the event of a breach of the standstill obligation.¹²

The hierarchical position of the Commission in State aid cases has recently been strengthened in the case *Deutsche Lufthansa*.¹³ In that judgment, the CJEU ruled that where the Commission has initiated the formal examination procedure (which takes place before taking a final decision), national courts are required to adopt all the necessary measures with a view to drawing the appropriate conclusions from an infringement of the obligation to suspend the implementation of that measure. This ruling was based in part on the reasoning that national courts must refrain from taking decisions which conflict with a decision of the Commission, even if it is provisional.¹⁴

At a practical level, it is worth noting that the European Commission has built up tremendous expertise in State aid cases over the years. It was already noted that this is not necessarily the case for national judges who, in the case of The Netherlands, might come across a State aid case maybe once in their judicial career.¹⁵ When considering the relation between the Commission and

⁹ See for instance Case C-39/94 *SFEI* [1996] ECR I-3547, para. 39-40.

¹⁰ *Ibid.*, para. 36.

¹¹ Subject to review from the CJEU.

¹² Case C-39/94 *SFEI* [1996] ECR I-3547, paras 44 and 50-53; Case C-1/09 *CELF II* [2010] ECR I-2099, para. 27.

¹³ Case C-284/12 *Deutsche Lufthansa* ECLI:EU:C:2013:755. This case has strong ties with the competition law judgment in Case C-344/98 *Masterfoods* [2000] ECR I-11369. It has been argued that the latter case establishes no primacy of the Commission over national courts, 'but rather imposes duties on the latter to apply [EU] law in a consistent way under the final control of the Court of Justice'. A.P. Komninos, 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap?' [2006/1], *The Competition Law Review* 2006, 5-26. This does not take away from the fact that under the *Deutsche Lufthansa* case law, judges are no longer able to make their own assessment of the State aid nature of a measure but must, barring some exceptions, follow that of the Commission once the formal investigation procedure has been initiated.

¹⁴ Case C-284/12 *Deutsche Lufthansa* ECLI:EU:C:2013:755, paras 41-42.

¹⁵ As can be seen from the judgments studied. This may be different for the highest courts, where some specialization can take place.

national courts in State aid cases, it is important to keep this difference in the level of expertise in mind. For instance, there is evidence in Dutch civil case law to suggest that judges can attach great value to the provisional or even hypothetical opinion of the Commission.¹⁶ The implication of such cases is that national courts, especially when confronted with difficult cases, may be tempted to defer to the Commission's assessment of the case even where there is no formal requirement to do so.¹⁷ It is against this background that the possibility of seeking and gaining advice from the Commission should be examined.

3 Commission Support in National State Aid Proceedings: Theory

Article 4(3) TEU, laying down the principle of sincere cooperation, requires the Union and the Member States to assist each other in carrying out tasks which flow from the Treaties. One implication of that principle is that national judges can request the European Commission's support in the course of State aid proceedings. This possibility, which was introduced already in 1995,¹⁸ is by now explicitly laid down in Article 29 of the Procedural Regulation¹⁹ and in the Commission Notice on the enforcement of State aid law by national courts (hereinafter: the 2009 Commission Notice).²⁰

According to the Procedural Regulation, national courts may either ask the Commission to transmit to it relevant information in its possession or ask the Commission for an opinion concerning the application of the State aid rules. The 2009 Commission Notice elaborates that requests for information may concern a pending Commission procedure, but also copies of existing Commission decisions, factual data, statistics, market studies and economic analysis, insofar as the protection of confidential information and business secrets is

¹⁶ Sometimes, the courts even include the hypothetical opinion of the Commission in their reasoning in cases where the alleged State aid has not in any way been brought before the Commission's attention, as far as can be learnt from the judgment: Rb. Alkmaar 20 April 2011, ECLI:NL:RBALK:2011:BW2032; Rb. Arnhem 2 November 2011, ECLI:NL:RBARN:2011:BU3569.

¹⁷ Cf. Van Cleynenbreugel, 'National Courts and EU Competition Law: Lost in Multilevel Confusion?', in: Bodiroga-Vukobrat (Ed.), *New Europe – Old Values? Reform and perseverance* (Heidelberg: Springer 2015).

¹⁸ Commission Notice on cooperation between national courts and the Commission in the State aid field, *OJ* 1995, C 312/8, chapter VI.

¹⁹ Council Regulation (EU) No 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification), *OJ* 2015, L 248/9 (hereinafter: The Procedural Regulation). The previous Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, *OJ* 1999, L 83/1, revised accordingly in 2013, has been repealed.

²⁰ Commission Notice on the enforcement of State aid law by national courts, *OJ* 2009, C 85/1, paras 77-96.

guaranteed. The Commission strives to provide this information within one month from the date of the request.

Requests for opinions extend beyond the mere transmission of information. Requested opinions can cover all economic, factual or legal matters which arise in the context of national proceedings. This could concern, for instance, the question of whether a certain measure qualifies as State aid, whether the measure meets a certain requirement of a Block Exemption Regulation or the legal prerequisites for damages claims under EU law. Requests for opinions cannot concern the compatibility of an aid measure, as such an assessment lies outside the competence of national courts. The Commission endeavours to provide an opinion within four months from the date of the request. Furthermore, the Commission has indicated, still in the 2009 Commission Notice, that it will limit itself to providing the national court with the factual information or the economic or legal clarification sought, without considering the merits of the case pending before the national court.

It is important to note that the Commission frames its assistance to national courts as part of its duty to defend the public interest rather than the private interests of the parties involved in the national proceedings. It therefore does not hear the parties before providing its opinion to the national court. The possibility to approach the Commission furthermore does not influence the possibility (and sometimes requirement) to refer preliminary questions on the basis of Article 267 TFEU. In other words, where a question concerning the interpretation of Articles 106-109 TFEU or the interpretation or validity of, say, a recovery decision or the General Block Exemption Regulation arises before a court against whose decision there is no remedy under national law, the possibility to seek the Commission's advice does not relieve that court from the obligation to refer a preliminary question.

As of 2013, the advisory role of the Commission is not dependent on the choice of a national judge whether to ask questions or not.²¹ Where the coherent application of Article 107(1) or Article 108 TFEU so requires, the Commission may submit written observations to the courts of the Member States that are responsible for applying the State aid rules. With the permission of the court in question, it may also make oral observations. Solely for the purpose of preparing these observations, the Commission may request the relevant court of the Member State to transmit documents at the disposal of the court that are necessary for the Commission's assessment of the matter. This possibility for

²¹ Art. 29(2) Procedural Regulation. The previous Procedural Regulation was amended in 2013 by Council Regulation/EU No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, *OJ* 2013, L 204/15.

the Commission to intervene as *amicus curiae* on its own accord already existed before in the context of EU antitrust law.²²

The preamble of the revised Procedural Regulation stresses that observations and opinions of the Commission must be submitted within the framework of national procedural rules and practices including those safeguarding the rights of the parties, in full respect of the independence of the national courts.²³ In that light, it should come as no surprise that opinions given by the Commission do not legally bind the national court. This means that, among others, a national judge can seek the Commission's advice concerning the interpretation of the notion of State aid in a specific case, but that the answer can only be considered to reflect the Commission's view without having been drafted as a formal decision. That view may be contradicted at a later stage by the Court of Justice. What this means for their exact legal status is still a cause of some uncertainty. Wright notes that Commission opinions in the area of competition law seem to be a *sui generis* instrument.²⁴ She finds that they cannot be equated to recommendations, which, under the *Grimaldi* case law,²⁵ have no legal binding force but must nevertheless be taken in to consideration by national courts. Neither do they seem to be quite the same as opinions in the sense of Article 288 TFEU. Wright does, however, note that Commission opinions given in the context discussed here could become binding indirectly through the court's judgment, particularly if it essentially transposes the Commission's advice.

It has been advised, therefore, that national judges approach Commission's opinions with some care – and that they motivate in their judgment if and to what extent the opinion has been taken into account, so as to maintain an image of independence and impartiality of the national judiciary.²⁶ It should be remembered that Commission opinions in this context may provide valuable information, but that they essentially encompass a non-reviewable assessment by an administrative body before whom the parties concerned could not exercise their right to be heard.²⁷ The Commission has acknowledged the need for cau-

²² Art. 15 of Council Regulation No 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ* 2003, L 1/1. Cf. Commission Notice of 27 April 2004 on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, *OJ* 2004, C 101/54, paras 17 ff.

²³ Preamble to the Procedural Regulation, para. 38.

²⁴ K. Wright, 'The European Commission's Own "Preliminary Reference Procedure" in competition cases' [2010/6] *ELJ* 736-759.

²⁵ Case C-322/88 *Grimaldi* [1989] ECR I-4407, para. 19.

²⁶ Van Cleynenbreugel, 'National Courts and EU Competition Law: Lost in Multilevel Confusion?', in: Bodiroga-Vukobrat (Ed.), *New Europe – Old Values? Reform and perseverance* (Heidelberg: Springer 2015).

²⁷ Consider in the light of general competition law the Explanatory Memorandum to the law amending the Netherlands Law on Competition: *Kamerstukken II 2003/04*, 29 276, No. 3, para. 2.5. Cf. Van Cleynenbreugel, 'National Courts and EU Competition Law: Lost in Multilevel Confusion?', in: Bodiroga-Vukobrat (Ed.), *New Europe – Old Values? Reform and perseverance* (Heidelberg: Springer 2015).

tion, hence its endeavour to limit itself to providing the national court with the factual information or the economic or legal clarification sought, without considering the merits of the case pending before the national court.²⁸

Still, there are some important advantages connected to seeking the Commission's advice over referring a preliminary ruling question. For one, the Commission strives to answer questions within one to four months depending on the type of support sought, while a preliminary ruling procedure can easily take up to sixteen months, severely slowing down national proceedings.²⁹ In addition, asking the Commission for information (rather than an opinion) can reveal important (factual) information that cannot be gained through preliminary ruling proceedings, such as information concerning the state of a pending Commission procedure. Given the importance of factual information in many national State aid cases, this advantage is not to be underestimated. It has also been noted that seeking a Commission opinion does not give rise to admissibility issues, allowing any court or tribunal to ask a broad range of questions, and that involving the Commission may help to relieve the case load of the EU courts.³⁰ Thus, the parties and the court can, at least in theory, deal with the national State aid case based on better information without the cumbersome process of a preliminary ruling.

4 Commission Opinions in Dutch State Aid Case Law

Although seeking the Commission's support in State aid cases can be a useful instrument to facilitate the coherent application of the State aid rules, the case law over the last nearly ten years shows that the Dutch courts rarely use that possibility. Still, in some cases Dutch courts *have* sought the Commission's advice. Their questions most frequently concerned the application of the standstill obligation, which will be discussed now, and the state of pending Commission procedures, which will be addressed in section 5.³¹

²⁸ Commission Notice on the enforcement of State aid law by national courts, *OJ* 2009, C 85/1, para. 93.

²⁹ Annual Report 2013 of the Court of Justice of the European Union. Synopsis of the work of the Court of Justice, the General Court and the Civil Service Tribunal, p. 98. Available at: curia.europa.eu/jcms/upload/docs/application/pdf/2014-06/qdag14001enc.pdf [last checked: 13-7-2015].

³⁰ K. Wright, 'The European Commission's Own "Preliminary Reference Procedure" in competition cases' [2010/6] *ELJ* 736-759.

³¹ Not discussed in this contribution are the cases in which a Dutch court has requested an opinion about the interpretation of Commission soft law. These cases are not included here because, while State aid issues may be indirectly relevant to the national case, it does not appear from the judgments that the case has been brought to address an alleged breach of the standstill obligation laid down in Art. 108(3) TFEU. For those interested in the relevant cases, see: CBB 14 December 2006, ECLI:NL:CBB:2006:AZ5838, *Administratiefrechtelijke Beslissingen* 2007, 136; CBB 10 July 2007, ECLI:NL:CBB:2007:BB0096, *Administratiefrechtelijke Beslissingen* 2008, 68.

4.1 Circumstances under which Opinions are sought

Dutch (administrative) judges have sought a Commission opinion relating to the qualification of a given measure as State aid or the applicability of an exemption in three cases in almost the last ten years.³² These cases can be seen as exceptions to the rule; the majority of State aid judgments by Dutch courts are handed down without consulting the Commission.³³ Of course, this is by no means problematic as such: it would rather be a cause for worry, not in the least in the light of judicial independence, if a national court were to routinely involve the Commission in State aid cases. While the cases in which an opinion has been requested cannot be cleanly distinguished from other similar State aid cases, it is noteworthy that two of the sets of questions referred to the Commission concerned a specific and well-defined issue, which lent itself well to seeking specific advice.³⁴ This is in itself worth noting because it seems that often, not enough information (or expertise) is available to a court to perform any kind of real analysis of the State aid criteria, let alone formulate a specific question.³⁵

The existence of a specific and clearly demarcated issue, however, is not absolutely necessary for a Dutch court to seek the Commission's advice. In one case, the administrative court formulated a very general question – essentially whether a certain measure constituted State aid and if so, whether it constituted new or existing aid.³⁶ Even so, it may still be assumed that courts will not be likely to consult with the Commission when the most important facts and arguments are not sufficiently plausible or substantiated. While the questions asked in the aforementioned case were of a quite general nature, the court's extensive discussion of the State aid claim as well as the Commission's opinion in response to the questions asked suggest that the alleged existence of State aid was underpinned by detailed facts and arguments.³⁷ Again, this is significant because research shows that most State aid cases before Dutch courts seem to fail due to lack of plausibility or substantiation, indicating that in many cases, insufficient information is available to even consider whether an opinion might be beneficial.

³² Rb. Rotterdam 28 March 2013, ECLI:NL:RBROT:2013:BZ5824; ABRvS 30 January 2013, ECLI:NL:RVS:2013:BY9933; ABRvS 11 July 2008, ECLI:NL:RVS:2008:BD3598.

³³ Submitting the search term 'staatssteun' or 'staatsteun' in the database www.rechtspraak.nl yields 486 judgments between 1 October 2005 and 29 September 2015.

³⁴ Rb. Rotterdam 28 March 2013, ECLI:NL:RBROT:2013:BZ5824; ABRvS 30 January 2013, ECLI:NL:RVS:2013:BY9933.

³⁵ This conclusion is based on the ongoing PhD-research carried out by the author of this contribution and will be presented in her thesis, expected later this year.

³⁶ ABRvS 11 July 2008, ECLI:NL:RVS:2008:BD3598.

³⁷ ABRvS 11 July 2008, ECLI:NL:RVS:2008:BD3598, para. 2.21.4.2.

4.2 The Commission Opinion and its Application to the National Case

In the three cases in which a national court did consult the Commission, it can be seen that the Commission formulated a comprehensive answer relating to the facts as presented by the court.³⁸ Possibly, the Commission has taken earlier criticisms concerning the too-general nature of its answers to heart. These criticisms noted that the Commission's answer is sometimes formulated in such general terms that the referring court can glean little help from it.³⁹ Instead, the opinions in the cases studied here seem to be quite extensive and tailored to the most important facts, meaning that judges can incorporate the Commission's opinion in their judgment quite easily. In fact, the judges in the three Dutch cases do just that. The most subtle example is a judgment by the Administration Division of the Council of State, in which the court refers to the Commission's response 'in addition to' its own assessment of the existence of State aid in that particular case.⁴⁰ In the other two judgments, the Commission's opinion does not so much seem to corroborate the court's own assessment as it does to function almost as a substitute for that assessment. For instance, in one of the cases, the extensively cited Commission opinion prompts the court to state simply that it will follow the Commission's reasoning. The rest of the judgment deals with the implications of that reasoning to the case at hand.⁴¹

While a Commission opinion is not formally binding, there are thus indications that its actual impact on a court's assessment of a case may be significant, possibly even to the point of making the opinion *de facto* binding.⁴² This may, in part, be the result of what has been described in the literature as the 'knowledge paradox'.⁴³ The knowledge paradox in court cases entails, in short, that when a judge requires an expert opinion because he does not have the knowledge

³⁸ As welcomed by P.C. Adriaanse, 'Noot bij ABRvS (2008-07-11)', *Administratiefrechtelijke Beslissingen* 2008/371, para. 4.

³⁹ P.C. Adriaanse & W. den Ouden, 'Noot bij CBb (2007-07-10)', *Administratiefrechtelijke Beslissingen* 2008, 68, point 3. See in the context of general competition law: T.M. Snoep, 'Samenwerking tussen de commissie en de Nederlandse rechter na invoering van verordening 1/2003' [2003/6] *M&M* 198-202.

⁴⁰ ABRvS 11 July 2008, ECLI:NL:RVS:2008:BD3598, para. 2.21.4.2.

⁴¹ Rb. Rotterdam 28 March 2013, ECLI:NL:RBROT:2013:BZ5824, para. 9.4.

⁴² Consider also K. Wright, 'The European Commission's Own "Preliminary Reference Procedure" in competition cases' [2010/6] *ELJ* 736-759: The transposition by a national court is more likely 'where the judge is less experienced in competition law or at judging economic evidence, where the court is more willing to apply an interpretation of Union law by a Union institution (albeit from the Commission rather than the CJEU), or for reasons of convenience. If the Commission's "expert" interpretation seems reasonable, there may be little incentive to look for an alternative.'

⁴³ G. de Groot, *Het deskundigenadvies in de civiele procedure* (The Hague 2008). The term 'knowledge paradox' is applied in this context to the topic of expert opinions sought by courts.

or experience necessary to come to a decision, he is dependent among others on the parties' input to assess the expert's expertise, which questions to ask and whether the opinion is correct. One of the implications of the knowledge paradox is that, once a judge lacks the expertise to assess a given situation and chooses to seek an expert opinion on the matter, the conditions under which he may deviate from that opinion are limited. It is reasonable to assume that judges will not be easily inclined to contradict a Commission opinion once they have asked for it. Arguably, after a judge has 'admitted' that he is uncertain how to apply State aid law in a given case by seeking the Commission's advice, it would be very difficult to explain why he would then choose not to follow that advice once it has been given.

The knowledge paradox may be particularly problematic in State aid cases for two reasons. Firstly, not only does the Commission have significant experience and expertise in the assessment of State aid cases, but under certain circumstances it also 'outranks' national courts in the EU law hierarchy. Under the *Deutsche Lufthansa* case law, after all, the Commission's assessment of the State aid nature of a measure *prima facie* binds the national court once it has been expressed in a decision to open the formal investigation procedure. In other words, not only does a national judge have to determine the accuracy and relevance of an opinion provided by an expert body, but he is also aware that the expert body's assessment may under circumstances have a higher legal status than its own.⁴⁴ Secondly, the advice sought by national courts in State aid cases concerns the interpretation of the law and its application to the facts – even if the Commission does strive to limit itself to providing the national court with the legal clarification sought without considering the merits of the case. Ultimately, interpreting the law and applying it to the facts is a task for the judiciary and not for an administrative body such as the Commission.⁴⁵ While the Commission is itself competent to determine, in a decision, whether a given measure qualifies as State aid, such a decision must be open to judicial review.⁴⁶ If a Commission opinion carries too much weight in a national court case, it would be highly problematic if the result would be that (part of) the legal assessment is *de facto* carried out by the Commission and can be only marginally controlled by the national court. This concern is exacerbated by the fact that the parties have no right to be heard by the Commission in the period leading up to the opinion.

The knowledge paradox can lead to some real risks in State aid cases. For a good illustration of this problem, consider a judgment by the Administration

⁴⁴ While the Commission's opinion does not have a higher legal status than the national court's assessment, once the Commission had taken a decision to open the formal investigation procedure, its assessment of the State aid nature of a measure does have a higher legal status.

⁴⁵ Cf. V. Sanderink, *De amicus curiae in het mededingingsrecht* (Amersfoort 2009).

⁴⁶ Case C-284/12 *Deutsche Lufthansa* ECLI:EU:C:2013:755.

Division of the Council of State in a dispute concerning the funding of higher education.⁴⁷ That court had asked the Commission for an opinion on the question whether offering law courses by the so-called ‘Open University’ constituted an economic activity which would, in turn, make the Open University an undertaking in the sense of Article 107(1) TFEU. The question of when the provision of educational services qualifies as an economic activity is also addressed in a 2012 Commission Communication.⁴⁸ In its opinion, the Commission stated that the courses offered did not seem to constitute an economic activity insofar as it could be demonstrated that the State of the Netherlands, by financing the courses, fulfilled its social, cultural and educational duties towards its population, and insofar as the financing covered a significant part of the costs of the courses so that there exists no real correlation between the factual costs of the courses and any private remunerations paid for the courses.⁴⁹

On the basis of this opinion, the Administration Division of the Council of State carried out its further analysis and concluded that the Open University did not qualify as an undertaking within the meaning of the State aid rules when it offered the contested (financed) law courses. This conclusion has been criticized⁵⁰ – not because the Administration Division misinterpreted or misapplied the Commission’s opinion, but because the Commission used an assessment framework that was, according to the criticism, subtly but significantly different from the CJEU’s case law on the matter and the 2012 Commission Communication. Given this novel assessment framework, it was suggested in the criticism that the Administration Division should have referred a preliminary question to the CJEU.

Of course, the fact that the Commission has given an opinion by no means relieves a court such as the Administration Division from a duty, where relevant,⁵¹ to request a preliminary ruling. And yet, there are any number of reasons why the Administration Division might be inclined to refrain from referring a preliminary question after having conferred with the Commission. Firstly, it will be a relevant concern that the national proceedings have already been delayed by referring questions to the Commission. In many cases, it will be undesirable to cause another, much longer, delay by initiating the preliminary ruling procedure. Secondly, it already appears from the question asked to the

⁴⁷ ABRvS 30 January 2013, ECLI:NL:RVS:2013:BY9933.

⁴⁸ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ 2012, C 8/4.

⁴⁹ Commission opinion as cited in ABRvS 30 January 2013, ECLI:NL:RVS:2013:BY9933, para. 8.5.

⁵⁰ T. Barkhuysen & M. Claessens, ‘Noot bij ABRvS (2013-01-30)’, *Administratiefrechtelijke Beslissingen* 2014, 344.

⁵¹ Consider, for instance, the doctrines of *acte clair* and *acte éclairé*: Case 283/81 *Cilfit* [1982] ECR 3415.

Commission that the Administration Division has difficulties in determining the right framework for applying the law. It follows that the Administration Division will not be very well suited to determine whether the framework applied by the Commission is the correct one, or whether a preliminary reference is called for. Why ask the Commission for advice if that advice is then to be checked against the Court of Justice? That would appear indecisive at least. What is more: while it may be a safe choice to refer a preliminary question in case of doubt, at least from a European perspective, it may well be the intent of one of the parties to raise such doubts with the aim of delaying the proceedings through such a reference.⁵²

These cases demonstrate that, while it may be beneficial to seek a Commission opinion in State aid cases, the inherent dangers should not be underestimated. While the Commission has previously been criticized for keeping its opinions too general, a more specific opinion that is better tailored to the facts of the case may wind up taking, in effect, the place of the court's own assessment of a case. This is a risk that is not easily mitigated due, in part, to the knowledge paradox and, in another part, to the fact that referring a preliminary question is not a timely solution for any remaining doubts. It stands to reason that both the Commission and the national courts should be very careful when using this particular coherence instrument.⁵³

4.3 Procedural Safeguards following a Commission Opinion

Given the relative weight of the Commission's advice in State aid cases, which is formulated without hearing the parties, it is important to know that several safeguards have been introduced at the national level to ensure that some basic rights are protected. Most significantly, parties receive the right in the administrative proceedings studied to formulate a response to the Commission's assessment and to react to the response formulated by the other parties. The 2009 Notice, on which the decision to refer a question is sometimes based,⁵⁴ does not explicitly mention such a possibility, nor does the revised Procedural Regulation, which has similarly been cited as a basis for seeking a Commission opinion.⁵⁵ The Procedural Regulation does clarify that the Commission's observations must be submitted within the framework of national procedural rules and practices including those safeguarding the rights of the

⁵² This is not to suggest that this was, in my opinion, the case in the proceedings before the Administration Division of the Council of State.

⁵³ A way of ensuring that such care is taken, as stated above, could be an obligation for courts to motivate whether, to what extent and why they have taken the Commission's advice into account.

⁵⁴ ABRvS 30 January 2013, ECLI:NL:RVS:2013:BY9933; Appellate court 's-Hertogenbosch 17 February 2015, ECLI:NL:GHSHE:2015:540 (concerning a request for information).

⁵⁵ ABRvS 15 April 2015, ECLI:NL:RVS:2015:1152.

parties.⁵⁶ Reverting to Dutch law, then, inspiration could be drawn from the Dutch General Administrative Law Act (Awb).⁵⁷ Article 8:45(6) Awb does provide for the rights of parties to submit their comments pursuant to a Commission opinion within the meaning of Article 15, first paragraph, of Regulation 1/2003 relating to the application of Articles 101 and 102 TFEU. While it has been suggested that this provision be amended to include Commission opinions in the area of State aid law,⁵⁸ to my knowledge no such steps have been taken so far. Nevertheless, it appears that Article 8:45(6) Awb is applied by analogy in State aid cases, ensuring that parties' basic rights of defence remain protected.

5 Requests for Information in Dutch State Aid Case Law

It is not uncommon that a Dutch judge must rule in a State aid dispute that has already come to the attention of the European Commission. At least until the opening of the formal investigation procedure, a national judge is bound to independently assess the State aid nature of a measure in order to ensure the observance of the standstill obligation.⁵⁹ Nevertheless, as is also stressed in the 2009 Commission Notice, it can be useful to ask the Commission information concerning the status quo of a pending investigation.

The question as to what extent the Dutch courts use that possibility results in a mixed picture. In most cases, it appears that the courts refrain from approaching the Commission at all.⁶⁰ This includes the cases mentioned earlier in which the court bases its final judgment (in part) on the hypothetical assessment of the Commission.⁶¹ This also includes cases where the court bases its final judgment (in part) on the Commission's preliminary assessment, as laid down for instance in a letter to the Member State.⁶² The fact that one of the parties has explicitly requested that the court seek the Commission's advice does not generally change that finding.⁶³ This need not be problematic, of course, there being no absolute duty to approach the Commission in such cases.

⁵⁶ Council Regulation No. 734/2013/EU, preamble, para. 19.

⁵⁷ Cf. Art. 44a Wetboek van Burgerlijke Rechtsvordering (Dutch Code of Civil Procedure).

⁵⁸ P.C. Adriaanse & J.R. van Angeren, 'De Awb en staatssteunvragen', in: T. Barkhuysen, W. den Ouden & J.E.M. Polak (red.), *Bestuursrecht harmoniseren: 15 jaar Awb* (The Hague 2010).

⁵⁹ Again, where relevant, he may (be required to) refer a preliminary question.

⁶⁰ For instance: Rb. Oost-Brabant 16 February 2015, ECLI:NL:RBOBR:2015:756, para. 20.

⁶¹ Examples include: Rb. Alkmaar 20 April 2011, ECLI:NL:RBALK:2011:BW2032; Rb. Arnhem 2 November 2011, ECLI:NL:RBARN:2011:BU3569. Both courts refer to HR 7 October 2005, ECLI:NL:HR:2005:AT6730.

⁶² Examples include: Rb. Amsterdam 22 June 2006, ECLI:NL:RBAMS:2006:AX9229, para. 9; Rb. 's-Hertogenbosch 24 October 2012, ECLI:NL:RBSHE:2012:BY1110, para. 4.8.

⁶³ Rb. The Hague 1 August 2007, ECLI:NL:RBSGR:2007:BB1424, para. 4.9.

Sometimes, a Dutch court does ask the Commission for information concerning a pending investigation. A nice example is the case *Shanks*.⁶⁴ The case concerned several municipalities that had signed an agreement with waste disposal company Attero. Shanks, Attero's competitor, considered that the agreement amounted to unlawful State aid. It therefore submitted a complaint with the Commission as well as commencing proceedings before the competent Dutch civil court. The Commission indicated in a letter to Shanks that the agreement did not seem to breach the State aid rules and that the complaint would be deemed to be withdrawn if further substantive comments would not be provided within one month.⁶⁵ At the time of the national civil proceedings before the Den Bosch appellate court, Shanks indicated that it had provided such comments but that the Commission's reaction thereto was still unknown. In the light of these facts, the appellate court considered that it would not take a final ruling before having received more information on the status of the complaint with the Commission, and ordered Shanks to provide more information to that effect. The appellate court then ruled that, depending on the information provided, it would consider approaching the Commission with questions regarding the status of its pending investigation. In a subsequent judgment, the appellate court did indeed choose to approach the Commission with several questions regarding the status quo of its investigation.⁶⁶

There is only one other example in almost the last ten years where a Dutch court actually did seek the Commission's advice concerning a pending procedure.⁶⁷ The question was asked by one of the highest administrative courts, the Dutch Trade and Industries Appeals Tribunal. The case was brought by a foundation providing home care services, which had initiated administrative proceedings as well as submitting a State aid complaint with the Commission. What makes this case interesting is that the question of whether there was a violation of the State aid rules depended in part on the conditions under which certain subsidized activities would be sold to the aspirant buyers. The complaining foundation argued that the plans concerning the sale of the activities would amount to the granting of unlawful State aid to its competitors. It therefore requested that the court postpone the proceedings pending the sale of the activities. The Trade and Industries Appeals Tribunal, probably mindful of the duration of its proceedings, instead approached the Commission with the question whether a decision on the complaint could be expected in a reasonably short time. Having been answered in the negative, the Trade and Industries Appeals

⁶⁴ Appellate court 's-Hertogenbosch 11 February 2014, ECLI:NL:GHSHE:2014:281, para. 4.29.

⁶⁵ Such a response is provided for in: European Commission 16 June 2009, Code of Best Practice for the conduct of State aid control procedures, *OJ* 2009, C 136/13, paras 49-50.

⁶⁶ Appellate court 's-Hertogenbosch 17 February 2015, ECLI:NL:GHSHE:2015:540, para. 7.7.

⁶⁷ CBB 13 September 2012, ECLI:CBB:2012:BX6991.

Tribunal decided to continue the proceedings in spite of the still ongoing negotiations regarding the sale.

It is notable for several reasons that the Trade and Industries Appeals Tribunal decided to seek the Commission's advice. The most obvious reason is that its decision to do so proves to be an exception to the rule. What is more, while it is rather common in civil proceedings that a complaint has also been filed with the Commission,⁶⁸ such parallel proceedings are actually quite rare before the administrative courts. In fact, the relative rarity of the situation may have prompted the Trade and Industries Appeals Tribunal to ask its question. Arguably, since it is not common in Dutch administrative proceedings that a complaint has also been submitted to the Commission, it may be reasonable to give more merit to the one case where it has, and take the necessary steps accordingly. Another noteworthy point is that the fact that the court sought information regarding the status of the Commission's investigation indicates that it would have been willing to postpone proceedings if the Commission had been on the brink of taking a decision. It is likely that the Commission's answer, that a decision was not due shortly, will not have contributed to any great sense of urgency on the part of the Trade and Industries Appeals Tribunal to secure the recovery or prevent the granting of the alleged aid.⁶⁹

This brings up an important point: Information that the Commission is not about to take a decision after a complaint may (falsely) give the national court the impression that a matter raised in State aid proceedings is not considered urgent. That may lead a court to consider that, barring evidence to the contrary, there is no need to take immediate measures preventing or recovering the alleged aid. Granted, this does not fit the national courts' role in State aid cases according to EU case law and the Commission's leniency should not be a reason to withhold the protection granted under Article 108(3) TFEU. However, if a court were to reassess the urgency of the matter based on the Commission's information, it would not necessarily be surprising given how difficult courts may find it to determine whether the State aid rules have been breached in a particular case and the intrusiveness of the consequences of a finding of unlawful State aid.

6 Cases where no Advice is sought

The above paragraphs have explored situations in which a court has asked the Commission for some form of advice or at least considered doing so. It is as interesting to note when judges refrain from seeking the

⁶⁸ It is worth noting that these cases usually concern interim relief.

⁶⁹ A.J. Metselaar & W. den Ouden, 'Noot bij CBb (2012-09-13)', *Administratiefrechtelijke Beslissingen* 2013/115, para. 4.

Commission's support. Two types of cases stand out in this regard. The first type of case concerns cases in which the administrative judge does not approach the Commission for an opinion, but instead rules that the administrative body should have consulted the Commission before taking a decision in which State aid issues are at stake. While very interesting, such cases will not be addressed further in this contribution.⁷⁰

The second type of case is just as interesting. It arises when a court must determine whether a State aid measure falls within the scope of a previous Commission decision, or whether the measure actually carried out deviates from the one that was originally notified and approved. Such cases arise before Dutch courts with some regularity and it might be expected that a court might consult the Commission to ask what exactly it meant to approve.⁷¹ A striking example where this did not happen is the hotly contested case concerning State aid to Dutch housing corporations.⁷² The aid measure in question had been notified to the Commission and was deemed compatible with the internal market.⁷³ The litigants in the national case argued that, while the Commission had approved the aid measure as notified, the measure had then been carried out in a way that deviated from the compatibility decision.

A complicating aspect was that the aid measure had been notified and assessed in connection with an existing aid scheme for housing corporations. The existing aid was to be approved under certain conditions. In notifying the aid measure that is at stake here, the Dutch authorities had indicated that the aid would be made available under the same conditions as the existing aid scheme. One of the issues in the national proceedings was whether the aid granted could be considered to fall within the ambit of the Commission's approval or might have been lawfully granted in any case in spite of the fact that it deviated from those conditions on some (according to the Dutch authorities, non-essential) points. Although it had been requested to approach the Commission for advice, the Administration Division of the Council of State in this case chose explicitly not to do so. Instead, it determined that the aid measure as it had actually been carried out did not fall within the ambit of the Commission's approval decision, but that the measure was nevertheless lawful because it was exempted from notification under the 2005 Commission Decision on Services

⁷⁰ This type of case will be discussed in detail in the author's PhD thesis that is expected to be completed in the course of this year.

⁷¹ As occurred in a single case: ABRvS 15 April 2015, ECLI:NL:RVS:2015:1152.

⁷² ABRvS 2 November 2011, ECLI:NL:RVS:2011:BU3143. For other interesting examples, see also Cbb 16 February 2011, ECLI:NL:CBB:2001:BP6917 and Rb. 's-Gravenhage 1 August 2007, ECLI:NL:RBSGR:2007:BB1424.

⁷³ Commission decision 15 December 2009, State aid No E 2/2005 and N 642/2009 – The Netherlands Existing and special project aid to housing corporations, *OJ* 2010, C 31/4.

of General Interest.⁷⁴ Incidentally, the 2005 Decision had also provided the framework for the Commission's analysis of the measure that had originally been notified.

It is still up for discussion whether the Administration Division was competent to assess the contested aid measure on the basis of the 2005 Decision after the Commission had already carried out this assessment specifically in its approval decision.⁷⁵ Arguably, an elegant solution to the problem in this case (caused by a somewhat minor derogation from the Commission's approval) would have been to seek the Commission's opinion on the case. This opinion could have addressed both the question of whether the measure as it had been carried out fell within the ambit of the approval decision and the question of whether, if not, the measure fulfilled the requirements of the 2005 Decision.

One might imagine several reasons why the Administration Division might have refrained from seeking an opinion in this manner. Perhaps the Administration Division saw no need to seek an opinion, considering itself well equipped to address the legal and factual questions involved on the basis of an analysis of the case law of the CJEU and an interpretation of the approval decision and the 2005 Decision itself. Perhaps it did not wish to subject its assessment to the analysis of the Commission, for reasons to do with the division of competence and separation of power or, possibly, with the politically sensitive nature of the matter. Perhaps it feared that the Commission's answer might lead to further questions that might require a preliminary ruling. As stated, such a preliminary ruling would take up much time while a final answer may have been desirable. In any case, it merits attention that there seems to have been a conscious choice in this case not to seek the Commission's advice (or, for that matter, refer a preliminary ruling question). Useful as the instrument of approaching the Commission might be, it is thus certainly not a given that it will be used, even in cases where that might seem quite obvious.

7 Outlook

Over almost the past ten years, there have only been a few instances in which a Dutch court has approached the European Commission for an opinion or information in a State aid case. This is unfortunate insofar as that seeking the Commission's advice in State aid cases could potentially be a very useful and quick coherence instrument. Not only can it help to ensure a

⁷⁴ Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, *OJ* 2005, L 312/67.

⁷⁵ See the discussion in S.C.G. Van den Bogaert & A.J. Metselaar, 'Noot bij ABRvS (2011-11-02)', *Administratiefrechtelijke Beslissingen* 2012, 156.

coherent application of the State aid rules across national courts, but it can also improve the coherence between national courts and the Commission itself in case of parallel proceedings, i.e. when the same alleged aid measure is being examined both by the Commission and by national courts.

Arguably, the relative rarity of requests for information or an opinion is usually due to the lack of proper substantiation of arguments based on the State aid rules. Beyond that, there are very good (and sometimes less good) arguments as to why a court might be hesitant to approach the Commission for advice. It may be clear that the provision of advice by the Commission to national courts gives rise to some real dangers. The former is, after all, an administrative body and does not rightfully have the final say on the interpretation and application of the State aid rules, where it remains vital to safeguard the independence of the judiciary. The Commission is itself aware of this danger, and the risk is softened considerably by the fact that Commission opinions are not binding and that the Commission takes care to limit itself to providing only the factual information or the economic or legal clarification sought, without considering the merits of the case pending before the national court. Another important mitigating factor is the possibility given under Dutch law to the parties to react to the Commission's opinion and the reactions of each other. This is very necessary compensation for the fact that the parties have no right to be heard by the Commission before it formulates its opinion.

Even so, the decision to approach the Commission is not and should not be taken lightly. Despite the non-binding status of a Commission opinion, there are strong indications that it can carry great weight in the final judgment of the court. Once having asked for an opinion, the national court is not well-placed to question the accuracy of the opinion or the restraint carried out by the Commission. Where in cases requiring an expert opinion, for instance on the technical or forensic aspects of a case, this problem could be solved by requesting a second opinion, that does not apply easily to the situation where the Commission is asked to provide an opinion. In case of doubt, the national court can only choose to refer a question for a preliminary ruling, which has some important disadvantages of its own.

Seeking the Commission's advice *can* be a sensible and smart solution to the many difficulties in enforcing the European State aid rules in national courts. It is also a solution that should be treated with caution both on the side of the national court and on the side of the Commission. This is also an important point to keep in mind once the Commission will more frequently act on its *amicus curiae* competencies under the Procedural Regulation.