B. GENERAL PROCEDURAL RULES
I

(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 659/1999
of 22 March 1999
laying down detailed rules for the application of Article 93 of the EC Treaty

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 94 thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

(1) Whereas, without prejudice to special procedural rules laid down in regulations for certain sectors, this Regulation should apply to aid in all sectors; whereas, for the purpose of applying Articles 77 and 92 of the Treaty, the Commission has specific competence under Article 93 thereof to decide on the compatibility of State aid with the common market when reviewing existing aid, when taking decisions on new or altered aid and when taking action regarding non-compliance with its decisions or with the requirement as to notification;

(2) Whereas the Commission, in accordance with the case-law of the Court of Justice of the European Communities, has developed and established a consistent practice for the application of Article 93 of the Treaty and has laid down certain procedural rules and principles in a number of communications; whereas it is appropriate, with a view to ensuring effective and efficient procedures pursuant to Article 93 of the Treaty, to codify and reinforce this practice by means of a regulation;

(3) Whereas a procedural regulation on the application of Article 93 of the Treaty will increase transparency and legal certainty;

(4) Whereas, in order to ensure legal certainty, it is appropriate to define the circumstances under which aid is to be considered as existing aid; whereas the completion and enhancement of the internal market is a gradual process, reflected in the permanent development of State aid policy; whereas, following these developments, certain measures, which at the moment they were put into effect did not constitute State aid, may since have become aid;

(5) Whereas, in accordance with Article 93(3) of the Treaty, any plans to grant new aid are to be notified to the Commission and should not be put into effect before the Commission has authorised it;

(6) Whereas, in accordance with Article 5 of the Treaty, Member States are under an obligation to cooperate with the Commission and to provide it with all information required to allow the Commission to carry out its duties under this Regulation;

(7) Whereas the period within which the Commission is to conclude the preliminary examination of notified aid should be set at two months from the receipt of a complete notification or from the receipt of a duly reasoned statement of the Member State concerned that it considers the notification to be complete because the additional information requested by the Commission is not available or has already been provided; whereas, for reasons of legal certainty, that examination should be brought to an end by a decision;

(8) Whereas in all cases where, as a result of the preliminary examination, the Commission cannot find that the aid is compatible with the common market, the formal investigation procedure should be opened in order to enable the Commission to gather all the information it needs to assess the compatibility of the aid and to allow the interested parties to submit their comments; whereas the rights of the interested parties can best be safeguarded within the framework of the formal investigation procedure provided for under Article 93(2) of the Treaty;

 Whereas, after having considered the comments submitted by the interested parties, the Commission should conclude its examination by means of a final decision as soon as the doubts have been removed; whereas it is appropriate, should this examination not be concluded after a period of 18 months from the opening of the procedure, that the Member State concerned has the opportunity to request a decision, which the Commission should take within two months; 

 Whereas, in order to ensure that the State aid rules are applied correctly and effectively, the Commission should have the opportunity of revoking a decision which was based on incorrect information; 

 Whereas, in order to ensure compliance with Article 93 of the Treaty, and in particular with the notification obligation and the standstill clause in Article 93(3), the Commission should examine all cases of unlawful aid; whereas, in the interests of transparency and legal certainty, the procedures to be followed in such cases should be laid down; whereas when a Member State has not respected the notification obligation or the standstill clause, the Commission should not be bound by time limits; 

 Whereas in cases of unlawful aid, the Commission should have the right to obtain all necessary information enabling it to take a decision and to restore immediately, where appropriate, undistorted competition; whereas it is therefore appropriate to enable the Commission to adopt interim measures addressed to the Member State concerned; whereas the interim measures may take the form of information injunctions, suspension injunctions and recovery injunctions; whereas the Commission should be enabled in the event of non-compliance with an information injunction, to decide on the basis of the information available and, in the event of non-compliance with suspension and recovery injunctions, to refer the matter to the Court of Justice direct, in accordance with the second subparagraph of Article 93(2) of the Treaty; 

 Whereas, after having considered the comments submitted by the interested parties, the Commission should conclude its examination by means of a final decision as soon as the doubts have been removed; whereas it is appropriate, should this examination not be concluded after a period of 18 months from the opening of the procedure, that the Member State concerned has the opportunity to request a decision, which the Commission should take within two months; 

 Whereas misuse of aid may have effects on the functioning of the internal market which are similar to those of unlawful aid and should thus be treated according to similar procedures; whereas unlike unlawful aid, aid which has possibly been misused is aid which has been previously approved by the Commission; whereas therefore the Commission should not be allowed to use a recovery injunction with regard to misuse of aid; 

 Whereas it is appropriate to define all the possibilities in which third parties have to defend their interests in State aid procedures; 

 Whereas in accordance with Article 93(1) of the Treaty, the Commission is under an obligation, in cooperation with Member States, to keep under constant review all systems of existing aid; whereas in the interests of transparency and legal certainty, it is appropriate to specify the scope of cooperation under that Article; 

 Whereas, in order to ensure compatibility of existing aid schemes with the common market and in accordance with Article 93(1) of the Treaty, the Commission should propose appropriate measures where an existing aid scheme is not, or is no longer, compatible with the common market and should initiate the procedure provided for in Article 93(2) of the Treaty if the Member State concerned declines to implement the proposed measures; 

 Whereas, in order to allow the Commission to monitor effectively compliance with Commission decisions and to facilitate cooperation between the Commission and Member States for the purpose of the constant review of all existing aid schemes in the Member States in accordance with Article 93(1) of the Treaty, it is necessary to introduce a general reporting obligation with regard to all existing aid schemes; 

 Whereas, where the Commission has serious doubts as to whether its decisions are being complied with, it should have at its disposal additional instruments allowing it to obtain the information necessary to verify that its decisions are being effectively complied with; whereas for this purpose on-site monitoring visits are an appropriate and useful instrument, in particular for cases where aid might have been misused; whereas therefore the Commission must be empowered to undertake on-site monitoring visits and must obtain the cooperation of the competent authorities of the Member States where an undertaking opposes such a visit;
(21) Whereas, in the interests of transparency and legal certainty, it is appropriate to give public information on Commission decisions while, at the same time, maintaining the principle that decisions in State aid cases are addressed to the Member State concerned; whereas it is therefore appropriate to publish all decisions which might affect the interests of interested parties either in full or in a summary form or to make copies of such decisions available to interested parties, where they have not been published or where they have not been published in full; whereas the Commission, when giving public information on its decisions, should respect the rules on professional secrecy, in accordance with Article 214 of the Treaty; and where it is therefore appropriate to publish all decisions which might affect the interests of interested parties either in full or in a summary form or to make copies of such decisions available to interested parties, where they have not been published or where they have not been published in full; whereas the Commission, when giving public information on its decisions, should respect the rules on professional secrecy, in accordance with Article 214 of the Treaty; and

(22) Whereas the Commission, in close liaison with the Member States, should be able to adopt implementing provisions laying down detailed rules concerning the procedures under this Regulation; whereas, in order to provide for cooperation between the Commission and the competent authorities of the Member States, it is appropriate to create an Advisory Committee on State aid to be consulted before the Commission adopts provisions pursuant to this Regulation,

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL

Article 1

Definitions

For the purpose of this Regulation:

(a) ‘aid’ shall mean any measure fulfilling all the criteria laid down in Article 92(1) of the Treaty;

(b) ‘existing aid’ shall mean:

(i) without prejudice to Articles 144 and 172 of the Act of Accession of Austria, Finland and Sweden, all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;

(ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council;

(iii) aid which is deemed to have been authorised pursuant to Article 4(6) of this Regulation or prior to this Regulation but in accordance with this procedure;

(iv) aid which is deemed to be existing aid pursuant to Article 15;

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation;

(c) ‘new aid’ shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

(d) ‘aid scheme’ shall mean any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount;

(e) ‘individual aid’ shall mean aid that is not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme;

(f) ‘unlawful aid’ shall mean new aid put into effect in contravention of Article 93(3) of the Treaty;

(g) ‘misuse of aid’ shall mean aid used by the beneficiary in contravention of a decision taken pursuant to Article 4(3) or Article 7(3) or (4) of this Regulation;

(h) ‘interested party’ shall mean any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.

CHAPTER II

PROCEDURE REGARDING NOTIFIED AID

Article 2

Notification of new aid

1. Save as otherwise provided in regulations made pursuant to Article 94 of the Treaty or to other relevant provisions thereof, any plans to grant new aid shall be
notified to the Commission in sufficient time by the Member State concerned. The Commission shall inform the Member State concerned without delay of the receipt of a notification.

2. In a notification, the Member State concerned shall provide all necessary information in order to enable the Commission to take a decision pursuant to Articles 4 and 7 (hereinafter referred to as ‘complete notification’).

**Article 3**

**Standstill clause**

Aid notifiable pursuant to Article 2(1) shall not be put into effect before the Commission has taken, or is deemed to have taken, a decision authorising such aid.

**Article 4**

**Preliminary examination of the notification and decisions of the Commission**

1. The Commission shall examine the notification as soon as it is received. Without prejudice to Article 8, the Commission shall take a decision pursuant to paragraphs 2, 3 or 4.

2. Where the Commission, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the common market of a notified measure, in so far as it falls within the scope of Article 92(1) of the Treaty, it shall decide that the measure is compatible with the common market (hereinafter referred to as a ‘decision not to raise objections’). The decision shall specify which exception under the Treaty has been applied.

4. Where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the common market of a notified measure, it shall decide to initiate proceedings pursuant to Article 93(2) of the Treaty (hereinafter referred to as a ‘decision to initiate the formal investigation procedure’).

5. The decisions referred to in paragraphs 2, 3 and 4 shall be taken within two months. That period shall begin on the day following the receipt of a complete notification. The notification will be considered as complete if, within two months from its receipt, or from the receipt of any additional information requested, the Commission does not request any further information. The period can be extended with the consent of both the Commission and the Member State concerned. Where appropriate, the Commission may fix shorter time limits.

6. Where the Commission has not taken a decision in accordance with paragraphs 2, 3 or 4 within the period laid down in paragraph 5, the aid shall be deemed to have been authorised by the Commission. The Member State concerned may thereupon implement the measures in question after giving the Commission prior notice thereof, unless the Commission takes a decision pursuant to this Article within a period of 15 working days following receipt of the notice.

**Article 5**

**Request for information**

1. Where the Commission considers that information provided by the Member State concerned with regard to a measure notified pursuant to Article 2 is incomplete, it shall request all necessary additional information. Where a Member State responds to such a request, the Commission shall inform the Member State of the receipt of the response.

2. Where the Member State concerned does not provide the information requested within the period prescribed by the Commission or provides incomplete information, the Commission shall send a reminder, allowing an appropriate additional period within which the information shall be provided.

3. The notification shall be deemed to be withdrawn if the requested information is not provided within the prescribed period, unless before the expiry of that period, either the period has been extended with the consent of both the Commission and the Member State concerned, or the Member State concerned, in a duly reasoned statement, informs the Commission that it considers the notification to be complete because the additional information requested is not available or has already been provided. In that case, the period referred to in Article 4(5) shall begin on the day following receipt of the statement. If the notification is deemed to be withdrawn, the Commission shall inform the Member State thereof.

**Article 6**

**Formal investigation procedure**

1. The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the common market. The decision shall call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed one month. In duly justified cases, the Commission may extend the prescribed period.
2. The comments received shall be submitted to the Member State concerned. If an interested party so requests, on grounds of potential damage, its identity shall be withheld from the Member State concerned. The Member State concerned may reply to the comments submitted within a prescribed period which shall normally not exceed one month. In duly justified cases, the Commission may extend the prescribed period.

**Article 7**

Decisions of the Commission to close the formal investigation procedure

1. Without prejudice to Article 8, the formal investigation procedure shall be closed by means of a decision as provided for in paragraphs 2 to 5 of this Article.

2. Where the Commission finds that, where appropriate following modification by the Member State concerned, the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission finds that, where appropriate following modification by the Member State concerned, the doubts as to the compatibility of the notified measure with the common market have been removed, it shall decide that the aid is compatible with the common market (hereinafter referred to as a ‘positive decision’). That decision shall specify which exception under the Treaty has been applied.

4. The Commission may attach to a positive decision conditions subject to which an aid may be considered compatible with the common market and may lay down obligations to enable compliance with the decision to be monitored (hereinafter referred to as a ‘conditional decision’).

5. Where the Commission finds that the notified aid is not compatible with the common market, it shall decide that the aid shall not be put into effect (hereinafter referred to as a ‘negative decision’).

6. Decisions taken pursuant to paragraphs 2, 3, 4 and 5 shall be taken as soon as the doubts referred to in Article 4(4) have been removed. The Commission shall as far as possible endeavour to adopt a decision within a period of 18 months from the opening of the procedure. This time limit may be extended by common agreement between the Commission and the Member State concerned.

7. Once the time limit referred to in paragraph 6 has expired, and should the Member State concerned so request, the Commission shall, within two months, take a decision on the basis of the information available to it. If appropriate, where the information provided is not sufficient to establish compatibility, the Commission shall take a negative decision.

**Article 8**

Withdrawal of notification

1. The Member State concerned may withdraw the notification within the meaning of Article 2 in due time before the Commission has taken a decision pursuant to Article 4 or 7.

2. In cases where the Commission initiated the formal investigation procedure, the Commission shall close that procedure.

**Article 9**

Revocation of a decision

The Commission may revoke a decision taken pursuant to Article 4(2) or (3), or Article 7(2), (3), (4), after having given the Member State concerned the opportunity to submit its comments, where the decision was based on incorrect information provided during the procedure which was a determining factor for the decision. Before revoking a decision and taking a new decision, the Commission shall open the formal investigation procedure pursuant to Article 4(4). Articles 6, 7 and 10, Article 11(1), Articles 13, 14 and 15 shall apply mutatis mutandis.

**CHAPTER III**

**PROCEDURE REGARDING UNLAWFUL AID**

**Article 10**

Examination, request for information and information injunction

1. Where the Commission has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay.

2. If necessary, it shall request information from the Member State concerned. Article 2(2) and Article 5(1) and (2) shall apply mutatis mutandis.

3. Where, despite a reminder pursuant to Article 5(2), the Member State concerned does not provide the information requested within the period prescribed by the Commission, or where it provides incomplete information, the Commission shall by decision require the information to be provided (hereinafter referred to as an ‘information injunction’). The decision shall specify what information is required and prescribe an appropriate period within which it is to be supplied.
**Article 11**

**Injunction to suspend or provisionally recover aid**

1. The Commission may, after giving the Member State concerned the opportunity to submit its comments, adopt a decision requiring the Member State to suspend any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the common market (hereinafter referred to as a 'suspension injunction').

2. The Commission may, after giving the Member State concerned the opportunity to submit its comments, adopt a decision requiring the Member State provisionally to recover any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the common market (hereinafter referred to as a 'recovery injunction'), if the following criteria are fulfilled:

   — according to an established practice there are no doubts about the aid character of the measure concerned
   
   and
   
   — there is an urgency to act
   
   and
   
   — there is a serious risk of substantial and irreparable damage to a competitor.

Recovery shall be effected in accordance with the procedure set out in Article 14(2) and (3). After the aid has been effectively recovered, the Commission shall take a decision within the time limits applicable to notified aid.

The Commission may authorise the Member State to couple the refunding of the aid with the payment of rescue aid to the firm concerned.

The provisions of this paragraph shall be applicable only to unlawful aid implemented after the entry into force of this Regulation.

**Article 12**

**Non-compliance with an injunction decision**

If the Member State fails to comply with a suspension injunction or a recovery injunction, the Commission shall be entitled, while carrying out the examination on the substance of the matter on the basis of the information available, to refer the matter to the Court of Justice of the European Communities direct and apply for a declaration that the failure to comply constitutes an infringement of the Treaty.

**Article 13**

**Decisions of the Commission**

1. The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4). In the case of decisions to initiate the formal investigation procedure, proceedings shall be closed by means of a decision pursuant to Article 7. If a Member State fails to comply with an information injunction, that decision shall be taken on the basis of the information available.

2. In cases of possible unlawful aid and without prejudice to Article 11(2), the Commission shall not be bound by the time-limit set out in Articles 4(5), 7(6) and 7(7).

3. Article 9 shall apply mutatis mutandis.

**Article 14**

**Recovery of aid**

1. Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a 'recovery decision'). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.

2. The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.

3. Without prejudice to any order of the Court of Justice of the European Communities pursuant to Article 185 of the Treaty, recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission’s decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Community law.

**Article 15**

**Limitation period**

1. The powers of the Commission to recover aid shall be subject to a limitation period of ten years.

2. The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme.
Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period. Each interruption shall start time running afresh. The limitation period shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Communities.

3. Any aid with regard to which the limitation period has expired, shall be deemed to be existing aid.

CHAPTER IV

PROCEDURE REGARDING MISUSE OF AID

Article 16
Misuse of aid
Without prejudice to Article 23, the Commission may in cases of misuse of aid open the formal investigation procedure pursuant to Article 4(4). Articles 6, 7, 9 and 10, Article 11(1), Articles 12, 13, 14 and 15 shall apply mutatis mutandis.

CHAPTER V

PROCEDURE REGARDING EXISTING AID SCHEMES

Article 17
Cooperation pursuant to Article 93(1) of the Treaty
1. The Commission shall obtain from the Member State concerned all necessary information for the review, in cooperation with the Member State, of existing aid schemes pursuant to Article 93(1) of the Treaty.

2. Where the Commission considers that an existing aid scheme is not, or is no longer, compatible with the common market, it shall inform the Member State concerned of its preliminary view and give the Member State concerned the opportunity to submit its comments within a period of one month. In duly justified cases, the Commission may extend this period.

Article 18
Proposal for appropriate measures
Where the Commission, in the light of the information submitted by the Member State pursuant to Article 17, concludes that the existing aid scheme is not, or is no longer, compatible with the common market, it shall issue a recommendation proposing appropriate measures to the Member State concerned. The recommendation may propose, in particular:
(a) substantive amendment of the aid scheme,
(b) introduction of procedural requirements,
(c) abolition of the aid scheme.

Article 19
Legal consequences of a proposal for appropriate measures
1. Where the Member State concerned accepts the proposed measures and informs the Commission thereof, the Commission shall record that finding and inform the Member State thereof. The Member State shall be bound by its acceptance to implement the appropriate measures.

2. Where the Member State concerned does not accept the proposed measures and the Commission, having taken into account the arguments of the Member State concerned, still considers that those measures are necessary, it shall initiate proceedings pursuant to Article 4(4). Articles 6, 7 and 9 shall apply mutatis mutandis.

CHAPTER VI

INTERESTED PARTIES

Article 20
Rights of interested parties
1. Any interested party may submit comments pursuant to Article 6 following a Commission decision to initiate the formal investigation procedure. Any interested party which has submitted such comments and any beneficiary of individual aid shall be sent a copy of the decision taken by the Commission pursuant to Article 7.

2. Any interested party may inform the Commission of any alleged unlawful aid and any alleged misuse of aid. Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for taking a view on the case, it shall inform the interested party thereof. Where the Commission takes a decision on a case concerning the subject matter of the information supplied, it shall send a copy of that decision to the interested party.

3. At its request, any interested party shall obtain a copy of any decision pursuant to Articles 4 and 7, Article 10(3) and Article 11.
CHAPTER VII

MONITORING

Article 21

Annual reports

1. Member States shall submit to the Commission annual reports on all existing aid schemes with regard to which no specific reporting obligations have been imposed in a conditional decision pursuant to Article 7(4).

2. Where, despite a reminder, the Member State concerned fails to submit an annual report, the Commission may proceed in accordance with Article 18 with regard to the aid scheme concerned.

Article 22

On-site monitoring

1. Where the Commission has serious doubts as to whether decisions not to raise objections, positive decisions or conditional decisions with regard to individual aid are being complied with, the Member State concerned, after having been given the opportunity to submit its comments, shall allow the Commission to undertake on-site monitoring visits.

2. The officials authorised by the Commission shall be empowered, in order to verify compliance with the decision concerned:

(a) to enter any premises and land of the undertaking concerned;

(b) to ask for oral explanations on the spot;

(c) to examine books and other business records and take, or demand, copies.

The Commission may be assisted if necessary by independent experts.

3. The Commission shall inform the Member State concerned, in good time and in writing, of the on-site monitoring visit and of the identities of the authorised officials and experts. If the Member State has duly justified objections to the Commission's choice of experts, the experts shall be appointed in common agreement with the Member State. The officials of the Commission and the experts authorised to carry out the on-site monitoring shall produce an authorisation in writing specifying the subject-matter and purpose of the visit.

4. Officials authorised by the Member State in whose territory the monitoring visit is to be made may be present at the monitoring visit.

5. The Commission shall provide the Member State with a copy of any report produced as a result of the monitoring visit.

6. Where an undertaking opposes a monitoring visit ordered by a Commission decision pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials and experts authorised by the Commission to enable them to carry out the monitoring visit. To this end the Member States shall, after consulting the Commission, take the necessary measures within eighteen months after the entry into force of this Regulation.

Article 23

Non-compliance with decisions and judgments

1. Where the Member State concerned does not comply with conditional or negative decisions, in particular in cases referred to in Article 14, the Commission may refer the matter to the Court of Justice of the European Communities direct in accordance with Article 93(2) of the Treaty.

2. If the Commission considers that the Member State concerned has not complied with a judgment of the Court of Justice of the European Communities, the Commission may pursue the matter in accordance with Article 171 of the Treaty.

CHAPTER VIII

COMMON PROVISIONS

Article 24

Professional secrecy

The Commission and the Member States, their officials and other servants, including independent experts appointed by the Commission, shall not disclose information which they have acquired through the application of this Regulation and which is covered by the obligation of professional secrecy.

Article 25

Addressee of decisions

Decisions taken pursuant to Chapters II, III, IV, V and VII shall be addressed to the Member State concerned. The Commission shall notify them to the Member State concerned without delay and give the latter the opportunity to indicate the Commission which information it considers to be covered by the obligation of professional secrecy.
Article 26

Publication of decisions

1. The Commission shall publish in the Official Journal of the European Communities a summary notice of the decisions which it takes pursuant to Article 4(2) and (3) and Article 18 in conjunction with Article 19(1). The summary notice shall state that a copy of the decision may be obtained in the authentic language version or versions.

2. The Commission shall publish in the Official Journal of the European Communities the decisions which it takes pursuant to Article 4(4) in their authentic language version. In the Official Journal published in languages other than the authentic language version, the authentic language version will be accompanied by a meaningful summary in the language of that Official Journal.

3. The Commission shall publish in the Official Journal of the European Communities the decisions which it takes pursuant to Article 7.

4. In cases where Article 4(6) or Article 8(2) applies, a short notice shall be published in the Official Journal of the European Communities.

5. The Council, acting unanimously, may decide to publish decisions pursuant to the third subparagraph of Article 93(2) of the Treaty in the Official Journal of the European Communities.

Article 27

Implementing provisions

The Commission, acting in accordance with the procedure laid down in Article 29, shall have the power to adopt implementing provisions concerning the form, content and other details of notifications, the form, content and other details of annual reports, details of time-limits and the calculation of time-limits, and the interest rate referred to in Article 14(2).

Article 28

Advisory Committee on State aid

An Advisory Committee on State aid (hereinafter referred to as the ‘Committee’) shall be set up. It shall be composed of representatives of the Member States and chaired by the representative of the Commission.

Article 29

Consultation of the Committee

1. The Commission shall consult the Committee before adopting any implementing provision pursuant to Article 27.

2. Consultation of the Committee shall take place at a meeting called by the Commission. The drafts and documents to be examined shall be annexed to the notification. The meeting shall take place no earlier than two months after notification has been sent. This period may be reduced in the case of urgency.

3. The Commission representative shall submit to the Committee a draft of the measures to be taken. The Committee shall deliver an opinion on the draft, within a time-limit which the chairman may lay down according to the urgency of the matter, if necessary by taking a vote.

4. The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask to have its position recorded in the minutes. The Committee may recommend the publication of this opinion in the Official Journal of the European Communities.

5. The Commission shall take the utmost account of the opinion delivered by the Committee. It shall inform the Committee on the manner in which its opinion has been taken into account.

Article 30

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Communities.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 22 March 1999.

For the Council
The President
G. VERHEUGEN

Article 1(b)(i) is replaced by the following:

"(i) without prejudice to Articles 144 and 172 of the Act of Accession of Austria, Finland and Sweden and to Annex IV, point 3 and the Appendix to said Annex of the Act of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;".


Article 1(b)(i) is replaced by the following:

‘(i) without prejudice to Articles 144 and 172 of the Act of Accession of Austria, Finland and Sweden, to Annex IV, point 3 and the Appendix to said Annex of the Act of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, and to Annex V, point 2 and 3(b) and the Appendix to said Annex of the Act of Accession of Bulgaria and Romania, all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;’.
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
(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 109 thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Parliament,

Whereas:

(1) In the context of a thorough modernisation of State aid rules, to contribute both to the implementation of the Europe 2020 strategy for growth (\(^1\)) and to budgetary consolidation, Article 107 of the Treaty on the Functioning of the European Union (TFEU) should be applied effectively and uniformly throughout the Union. Regulation (EC) No 659/1999 (\(^2\)) codified and reinforced the Commission's previous practice of increasing legal certainty and supporting the development of State aid policy in a transparent environment. However, in the light of the experience gained in its application and of recent developments such as the enlargement of the Union and the economic and financial crisis, certain aspects of Regulation (EC) No 659/1999 should be amended in order to enable the Commission to be more effective.

(2) In order to assess the compatibility with the internal market of any notified or unlawful State aid for which the Commission has exclusive competence under Article 108 of the TFEU, it is appropriate to ensure that the Commission has the power, for the purposes of enforcing the State aid rules, to request all necessary market information from any Member State, undertaking or association of undertakings whenever it has doubts as to the compatibility of the measure concerned with the Union rules, and has therefore initiated the formal investigation procedure. In particular, the Commission should use this power in cases in which a complex substantive assessment appears necessary. In deciding whether to use this power, the Commission should take due account of the duration of the preliminary investigation.

(3) For the purpose of assessing the compatibility of an aid measure after the initiation of the formal investigation procedure, in particular as regards technically complex cases subject to substantive assessment, the Commission should be able, by simple request or by decision, to require any Member State, undertaking or association of undertakings to provide all market information necessary for completing its assessment, if the information provided by the Member State concerned during the course of the preliminary investigation is not sufficient, taking due account of the principle of proportionality, in particular for small and medium-sized enterprises.

(4) In the light of the special relationship between aid beneficiaries and the Member State concerned, the Commission should be able to request information from an aid beneficiary only in agreement with the Member State concerned. The provision of information by the beneficiary of the aid measure in question does not constitute a legal basis for bilateral negotiations between the Commission and the beneficiary in question.

(5) The Commission should select the addressees of information requests on the basis of objective criteria appropriate to each case, while ensuring that, when the request is addressed to a sample of undertakings or associations thereof, the sample of respondents is representative within each category. The information sought should consist, in particular, of factual company and market data and facts-based analysis of the functioning of the market.

(6) The Commission, as the initiator of the procedure, should be responsible for verifying both the information transmission by the Member States, undertakings or associations of undertakings, and the purported confidentiality of the information to be disclosed.

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The Commission should be able to enforce compliance with the requests for information it addresses to any undertaking or association of undertakings, as appropriate, by means of proportionate fines and periodic penalty payments. In setting the amounts of fines and periodic penalty payments, the Commission should take due account of the principles of proportionality and appropriateness, in particular as regards small and medium-sized enterprises. The rights of the parties requested to provide information should be safeguarded by giving them the opportunity to make known their views before any decision imposing fines or periodic penalty payments is taken. The Court of Justice of the European Union should have unlimited jurisdiction with regard to such fines and periodic penalties pursuant to Article 261 of the TFEU.

Taking due account of the principles of proportionality and appropriateness, the Commission should be able to reduce the periodic penalty payments or waive them entirely, when addressees of requests provide the information requested, albeit after the expiry of the deadline.

Fines and periodic penalty payments are not applicable to Member States, since they are under a duty to cooperate sincerely with the Commission in accordance with Article 4 of the Treaty on European Union (TEU), and to provide the Commission with all information required to allow it to carry out its duties under Regulation (EC) No 659/1999.

In order to safeguard the rights of defence of the Member State concerned, it should be provided with copies of the requests for information sent to other Member States, undertakings or associations of undertakings, and be able to submit its observations on the comments received. It should also be informed of the names of the undertakings and the associations of undertakings requested, to the extent that these entities have not demonstrated a legitimate interest in the protection of their identity.

The Commission should take due account of the legitimate interests of undertakings in the protection of their business secrets. It should not be able to use confidential information provided by respondents, which cannot be aggregated or otherwise be anonymised, in any decision unless it has previously obtained their agreement to disclose that information to the Member State concerned.

In cases where information marked as confidential does not seem to be covered by obligations of professional secrecy, it is appropriate to establish a mechanism by which the Commission can decide the extent to which such information can be disclosed. Any such decision to reject a claim that information is confidential should indicate a period at the end of which the information will be disclosed, so that the respondent can make use of any judicial protection available to it, including any interim measure.

The Commission should be able, on its own initiative, to examine information on unlawful aid, from whatever source, in order to ensure compliance with Article 108 of the TFEU, and in particular with the notification obligation and standstill clause laid down in Article 108(3) of the TFEU, and to assess the compatibility of an aid with the internal market. In that context, complaints are an essential source of information for detecting infringements of the Union rules on State aid.

To improve the quality of the complaints submitted to the Commission, and at the same time increase transparency and legal certainty, it is appropriate to define the conditions that a complaint should fulfil in order to put the Commission in possession of information regarding alleged unlawful aid and set in motion the preliminary examination. Submissions not meeting those conditions should be treated as general market information, and should not necessarily lead to ex officio investigations.

Complainants should be required to demonstrate that they are interested parties within the meaning of Article 108(2) of the TFEU and of Article 1(h) of Regulation (EC) No 659/1999. They should also be required to provide a certain amount of information in a form that the Commission should be empowered to define in an implementing provision. In order not to discourage prospective complainants, that implementing provision should take into account that the demands on interested parties for lodging a complaint should not be burdensome.

For reasons of legal certainty, it is appropriate to establish limitation periods for the imposition and enforcement of fines and periodic penalty payments.
In order to ensure that the Commission addresses similar issues in a consistent manner across the internal market, it is appropriate to complete the existing powers of the Commission by introducing a specific legal basis to launch investigations into sectors of the economy or into certain aid instruments across several Member States. For reasons of proportionality and in the light of the high administrative burden entailed by such investigations, sector inquiries should be carried out only when the information available substantiates a reasonable suspicion that State aid measures in a particular sector could materially restrict or distort competition within the internal market in several Member States, or that existing aid measures in a particular sector in several Member States are not, or are no longer, compatible with the internal market. Such inquiries would enable the Commission to deal in an efficient and transparent way with horizontal State aid issues and to obtain an ex ante overview of the sector concerned.

Consistency in the application of the State aid rules requires that arrangements be established for cooperation between the courts of the Member States and the Commission. Such cooperation is relevant for all courts of the Member States that apply Article 107(1) and Article 108 of the TFEU. In particular, national courts should be able to ask the Commission for information or for its opinion on points concerning the application of State aid rules. The Commission should also be able to submit written or oral observations to courts which are called upon to apply Article 107(1) or Article 108 of the TFEU. When assisting national courts in this respect, the Commission should act in accordance with its duty to defend the public interest.

Those observations and opinions of the Commission should be without prejudice to Article 267 of the TFEU and not legally bind the national courts. They should 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. Observations submitted by the Commission on its own initiative should be limited to cases that are important for the coherent application of Article 107(1) or Article 108 of the TFEU, in particular to cases which are significant for the enforcement or the further development of Union State aid case law.

In the interests of transparency and legal certainty, information on Commission decisions should be made public. It is therefore appropriate to publish decisions to impose fines or periodic penalty payments, given that they affect the interests of the sources concerned. The Commission, when publishing its decisions, should respect the rules on professional secrecy, including the protection of all confidential information and personal data, in accordance with Article 339 of the TFEU.

The Commission, in close liaison with the Advisory Committee on State aid, should be able to adopt implementing provisions laying down detailed rules concerning the form, content and other criteria of the complaints submitted in accordance with Regulation (EC) No 659/1999.

Regulation (EC) No 659/1999 should therefore be amended accordingly.

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 659/1999 is amended as follows:

(1) the title of the Regulation is replaced by the following:


(2) the title of Article 5 is replaced by the following:

‘Request for information made to the notifying Member State’;

(3) the following Articles are inserted:

‘Article 6a

Request for information made to other sources

1. After the initiation of the formal investigation procedure provided for in Article 6, in particular as regards technically complex cases subject to substantive assessment, the Commission may, if the information provided by a Member State concerned during the course of the preliminary investigation is not sufficient, request any other Member State, an undertaking or an association of undertakings to provide all market information necessary to enable the Commission to complete its assessment of the measure at stake taking due account of the principle of proportionality, in particular for small and medium-sized enterprises.'
2. The Commission may request information only:

(a) if it is limited to formal investigation procedures that have been identified by the Commission as being ineffective to date; and

(b) in so far as aid beneficiaries are concerned, if the Member State concerned agrees to the request.

3. The undertakings or associations of undertakings providing information following a Commission’s request for market information based on paragraphs 6 and 7 shall submit their answer simultaneously to the Commission and to the Member State concerned, to the extent that the documents provided do not include information that is confidential vis-à-vis that Member State.

The Commission shall steer and monitor the information transmission between the Member States, undertakings or associations of undertakings concerned, and verify the purported confidentiality of the information transmitted.

4. The Commission shall request only information that is at the disposal of the Member State, undertaking or association of undertakings concerned by the request.

5. Member States shall provide the information on the basis of a simple request and within a time limit prescribed by the Commission which should normally not exceed one month. Where a Member State does not provide the information requested within that period or provides incomplete information, the Commission shall send a reminder.

6. The Commission may, by simple request, require an undertaking or an association of undertakings to provide information. Where the Commission sends a simple request for information to an undertaking or an association of undertakings, it shall state the legal basis and the purpose of the request, specify what information is required and prescribe a proportionate time limit within which the information is to be provided. It shall also indicate the fines provided for in Article 6b(1) and shall indicate or impose the periodic penalties payments provided for in Article 6b(2), as appropriate. In addition, it shall indicate the right of the undertaking or association of undertakings to have the decision reviewed by the Court of Justice of the European Union.

8. When issuing a request under paragraph 1 or 6, or adopting a decision under paragraph 7, the Commission shall also simultaneously provide the Member State concerned with a copy thereof. The Commission shall indicate the criteria by which it selected the recipients of the request or decision.

9. The owners of the undertakings or their representatives, or, in the case of legal persons, companies, firms or associations having no legal personality, the persons authorised to represent them by law or by their constitution, shall supply on their behalf the information requested or required. Persons duly authorised to act may supply the information on behalf of their clients. The latter shall nevertheless be held fully responsible if the information supplied is incorrect, incomplete or misleading.

Article 6b

Fines and periodic penalty payments

1. The Commission may, if deemed necessary and proportionate, impose by decision on undertakings or associations of undertakings fines not exceeding 1 % of their total turnover in the preceding business year where they, intentionally or through gross negligence:

(a) supply incorrect or misleading information in response to a request made pursuant to Article 6a(6);

(b) supply incorrect, incomplete or misleading information in response to a decision adopted pursuant to Article 6a(7), or do not supply the information within the prescribed time limit.

2. The Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments where an undertaking or association of undertakings fails to supply complete and correct information as requested by the Commission by decision adopted pursuant to Article 6a(7).
The periodic penalty payments shall not exceed 5% of the average daily turnover of the undertaking or association concerned in the preceding business year for each working day of delay, calculated from the date established in the decision, until it supplies complete and correct information as requested or required by the Commission.

3. In fixing the amount of the fine or periodic penalty payment, regard shall be had to the nature, gravity and duration of the infringement, taking due account of the principles of proportionality and appropriateness, in particular for small and medium-sized enterprises.

4. Where the undertakings or associations of undertakings have justified the obligation which the periodic penalty payment was intended to enforce, the Commission may reduce the definitive amount of the periodic penalty payment compared to that under the original decision imposing periodic penalty payments. The Commission may also waive any periodic penalty payment.

5. Before adopting any decision in accordance with paragraph 1 or 2, the Commission shall set a final deadline of two weeks to receive the missing market information from the undertakings or associations of undertakings concerned and also give them the opportunity of making known their views.

6. The Court of Justice of the European Union shall have unlimited jurisdiction within the meaning of Article 261 of the TFEU to review fines or periodic penalty payments imposed by the Commission. It may cancel, reduce or increase the fine or periodic penalty payment imposed.

(4) in Article 7, the following paragraphs are added:

'8. Before adopting any decision in accordance with paragraphs 2 to 5, the Commission shall give the Member State concerned the opportunity of making known its views, within a time-limit that shall not normally exceed one month, on the information received by the Commission and provided to the Member State concerned pursuant to Article 6a(3).

9. The Commission shall not use confidential information provided by respondents, which cannot be aggregated or otherwise be anonymised, in any decision taken in accordance with paragraphs 2 to 5, unless it has obtained their agreement to disclose that information to the Member State concerned. The Commission may take a reasoned decision, which shall be notified to the undertaking or association of undertakings concerned, finding that information provided by a respondent and marked as confidential is not protected, and setting a date after which the information will be disclosed. That period shall not be less than one month.'

10. The Commission shall take due account of the legitimate interests of undertakings in the protection of their business secrets and other confidential information. An undertaking or an association of undertakings providing information pursuant to Article 6a, and which is not a beneficiary of the State aid measure in question, may request, on grounds of potential damage, that its identity be withheld from the Member State concerned.'

(5) in Article 10 paragraphs 1 and 2 are replaced by the following:

'1. Without prejudice to Article 20, the Commission may on its own initiative examine information regarding alleged unlawful aid from whatever source.

The Commission shall examine without undue delay any complaint submitted by any interested party in accordance with Article 20(2) and shall ensure that the Member State concerned is kept fully and regularly informed of the progress and outcome of the examination.

2. If necessary, the Commission shall request information from the Member State concerned. Article 2(2) and Article 5(1) and (2) shall apply mutatis mutandis.

After the initiation of the formal investigation procedure, the Commission may also request information from any other Member State, from an undertaking, or association of undertakings in accordance with Article 6a and 6b, which shall apply mutatis mutandis.'

(6) the following chapter heading is inserted after Article 14:

'CHAPTER IIIA
LIMITATION PERIODS';

(7) The title of Article 15 is replaced by the following:

'Limitation period for the recovery of aid';

(8) the following Articles are inserted:

'Article 15a
Limitation period for the imposition of fines and periodic penalty payments
1. The powers conferred on the Commission by Article 6b shall be subject to a limitation period of three years.'
2. The period provided for in paragraph 1 shall start on the day on which the infringement referred to in Article 6b is committed. However, in the case of continuing or repeated infringements, the period shall begin on the day on which the infringement ceases.

3. Any action taken by the Commission for the purpose of the investigation or proceedings in respect of an infringement referred to in Article 6b shall interrupt the limitation period for the imposition of fines or periodic penalty payments, with effect from the date on which the action is notified to the undertaking or association of undertakings concerned.

4. After each interruption, the limitation period shall start running afresh. However, the limitation period shall expire at the latest on the day on which a period of six years has elapsed without the Commission having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which the limitation period is suspended in accordance with paragraph 5.

5. The limitation period for the imposition of fines or periodic penalty payments shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Union.

Article 15b
Limitation periods for the enforcement of fines and periodic penalty payments

1. The powers of the Commission to enforce decisions adopted pursuant to Article 6b shall be subject to a limitation period of five years.

2. The period provided for in paragraph 1 shall start on the day on which the decision taken pursuant to Article 6b becomes final.

3. The limitation period provided for in paragraph 1 shall be interrupted:

(a) by notification of a decision modifying the original amount of the fine or periodic penalty payment or refusing an application for modification;

(b) by any action of a Member State, acting at the request of the Commission, or of the Commission, intended to enforce payment of the fine or periodic penalty payment.

4. After each interruption, the limitation period shall start running afresh.

5. The limitation period provided for in paragraph 1 shall be suspended for so long as:

(a) the respondent is allowed time to pay;

(b) the enforcement of payment is suspended pursuant to a decision of the Court of Justice of the European Union.

(9) Article 16 is replaced by the following:

‘Article 16
Misuse of aid

Without prejudice to Article 23, the Commission may, in cases of misuse of aid, initiate the formal investigation procedure pursuant to Article 4(4). Articles 6, 6a, 6b, 7, 9 and 10, Article 11(1) and Articles 12 to 15 shall apply mutatis mutandis.’

(10) in Article 20, paragraph 2 is replaced by the following:

‘2. Any interested party may submit a complaint to inform the Commission of any alleged unlawful aid or any alleged misuse of aid. To that effect, the interested party shall duly complete a form that has been defined in an implementing provision referred to in Article 27 and shall provide the mandatory information requested therein.

Where the Commission considers that the interested party does not comply with the compulsory complaint form, or that the facts and points of law put forward by the interested party do not provide sufficient grounds to show, on the basis of a prima facie examination, the existence of unlawful aid or misuse of aid, it shall inform the interested party thereof and call upon it to submit comments within a prescribed period which shall not normally exceed one month. If the interested party fails to make known its views within the prescribed period, the complaint shall be deemed to have been withdrawn. The Commission shall inform the Member State concerned when a complaint has been deemed to have been withdrawn.

The Commission shall send a copy of the decision on a case concerning the subject matter of the complaint to the complainant’;
(11) the following Chapter is inserted after Article 20:

'CHAPTER VIA

INVESTIGATIONS INTO SECTORS OF THE ECONOMY AND INTO AID INSTRUMENTS

Article 20a

Investigations into sectors of the economy and into aid instruments

1. Where the information available substantiates a reasonable suspicion that State aid measures in a particular sector or based on a particular aid instrument may materially restrict or distort competition within the internal market in several Member States, or that existing aid measures in a particular sector in several Member States are not, or no longer, compatible with the internal market, the Commission may conduct an inquiry across various Member States into the sector of the economy or the use of the aid instrument concerned. In the course of that inquiry, the Commission may request the Member States and/or the undertakings or associations of undertakings concerned to supply the necessary information for the application of Articles 107 and 108 of the TFEU, taking due account of the principle of proportionality.

The Commission shall state the reasons for the inquiry and for the choice of addressees in all requests for information sent under this Article.

The Commission shall publish a report on the results of its inquiry into particular sectors of the economy or particular aid instruments across various Member States and shall invite the Member States and any undertakings or associations of undertakings concerned to submit comments.

2. Information obtained from sector inquiries may be used in the framework of procedures under this Regulation.

3. Articles 5, 6a and 6b shall apply mutatis mutandis.';

(12) the following Chapter is inserted after Article 23:

'CHAPTER VIIA

COOPERATION WITH NATIONAL COURTS

Article 23a

Cooperation with national courts

1. For the application of Article 107(1) and Article 108 of the TFEU, the courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of State aid rules.

2. Where the coherent application of Article 107(1) or Article 108 of the TFEU so requires, the Commission, acting on its own initiative, may submit written observations to the courts of the Member States that are responsible for applying the State aid rules. It may, with the permission of the court in question, also make oral observations.

The Commission shall inform the Member State concerned of its intention to submit observations before formally doing so.

For the exclusive purpose of preparing its observations, the Commission may request the relevant court of the Member State to transmit documents at the disposal of the court, necessary for the Commission's assessment of the matter.

(13) Article 25 is replaced by the following:

'Article 25

Addressee of decisions

1. The decisions taken pursuant to Article 6a(7), Article 6b(1) and (2), and Article 7(9) shall be addressed to the undertaking or association of undertakings concerned. The Commission shall notify the decision to the addressee without delay and shall give the addressee the opportunity to indicate to the Commission which information it considers to be covered by the obligation of professional secrecy.

2. All other decisions of the Commission taken pursuant to Chapters II, III, IV, V and VII shall be addressed to the Member State concerned. The Commission shall notify them to the Member State concerned without delay and shall give that Member State the opportunity to indicate to the Commission which information it considers to be covered by the obligation of professional secrecy.';

(14) in Article 26, the following paragraph is inserted:

'2a. The Commission shall publish in the Official Journal of the European Union the decisions which it takes pursuant to Article 6b(1) and (2).';
(15) Article 27 is replaced by the following:

‘Article 27

Implementing provisions

The Commission, acting in accordance with the procedure laid down in Article 29, shall have the power to adopt implementing provisions concerning:

(a) the form, content and other details of notifications;

(b) the form, content and other details of annual reports;

(c) the form, content and other details of complaints submitted in accordance with Article 10(1) and Article 20(2);

(d) details of time-limits and the calculation of time-limits; and

(e) the interest rate referred to in Article 14(2).’

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 22 July 2013.

For the Council
The President
C. ASHTON
COMMISSION REGULATION (EU) No 372/2014
of 9 April 2014
amending Regulation (EC) No 794/2004 as regards the calculation of certain time limits, the handling of complaints, and the identification and protection of confidential information

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (1), and in particular Article 27 thereof,

After consulting the Advisory Committee on State aid,

Whereas:

(1) In the context of the modernisation of State aid rules to contribute both to the implementation of the Europe 2020 strategy for growth and to budgetary consolidation (2), Regulation (EC) No 659/1999 was amended by Regulation (EU) No 734/2013 (3) to improve the effectiveness of State aid control. That amendment sought in particular to render more effective the handling of complaints by the Commission and to introduce powers for the Commission to request information directly from market participants and to conduct investigations into sectors of the economy and into aid instruments.

(2) In light of those amendments, it is necessary to identify the events determining the starting point for the calculation of time-limits in the context of requests for information addressed to third parties pursuant to Regulation (EC) No 659/1999.

(3) The Commission may, on its own initiative, examine information on unlawful aid from any source, in order to assess compliance with Articles 107 and 108 of the Treaty. In that context, complaints are an essential source of information for detecting violations of State aid rules. It is therefore important to define clear and efficient procedures for handling complaints lodged with the Commission.

(4) According to Article 20 of Regulation (EC) No 659/1999, only interested parties may submit complaints to inform the Commission of any alleged unlawful aid or misuse of aid. To that end, natural and legal persons submitting complaints should be required to demonstrate that they are interested parties within the meaning of Article 1(h) of Regulation (EC) No 659/1999.

(5) To streamline the handling of complaints and at the same time increase transparency and legal certainty, it is appropriate to define the information that complainants should provide to the Commission. In order to ensure that the Commission receives all relevant information regarding alleged unlawful or misused aid, Regulation (EC) No 659/1999 requires interested parties to complete a form and submit all the mandatory information requested therein. The form to be used for that purpose should therefore be established.

The requirements to be fulfilled by interested parties when lodging complaints should not be excessively burdensome, while ensuring that the Commission receives all the information necessary to start an investigation into the alleged unlawful or misused aid.

To ensure that business secrets and other confidential information provided to the Commission are treated in compliance with Article 339 of the Treaty, any person submitting information should clearly identify which information it considers to be confidential and why it is confidential. The person concerned should be required to provide the Commission with a separate non-confidential version of the information that could be submitted to the relevant Member State for comments.

Commission Regulation (EC) No 794/2004 (1) should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

**Article 1**

Regulation (EC) No 794/2004 is amended as follows:

(1) Article 8 is amended as follows:

(a) paragraph 1 is replaced by the following:

‘1. Time-limits provided for in Regulation (EC) No 659/1999 and in this Regulation or fixed by the Commission pursuant to Article 108 of the Treaty shall be calculated in accordance with Regulation (EEC, Euratom) No 1182/71, and the specific rules set out in paragraphs 2 to 5b of this Article. In case of conflict, the provisions of this Regulation shall prevail.’;

(b) the following paragraphs are inserted:

‘5a. With regard to the time-limit for the submission of the information requested from third parties pursuant to Article 6a(6) of Regulation (EC) No 659/1999, the receipt of the request for information shall be the relevant event for the purposes of Article 3(1) of Regulation (EEC, Euratom) No 1182/71.

5b. With regard to the time-limit for the submission of the information requested from third parties pursuant to Article 6a(7) of Regulation (EC) No 659/1999, the notification of the decision shall be the relevant event for the purposes of Article 3(1) of Regulation (EEC, Euratom) No 1182/71.’;

(2) the following Chapters Va and Vb are inserted after Article 11:

‘CHAPTER Va

HANDLING OF COMPLAINTS

Article 11a

Admissibility of complaints

1. Any person submitting a complaint pursuant to Articles 10(1) and 20(2) of Regulation (EC) No 659/1999 shall demonstrate that it is an interested party within the meaning of Article 1(h) of that Regulation.

2. Interested parties shall duly complete the form set out in Annex IV and provide all the mandatory information requested therein. On a reasoned request by an interested party, the Commission may dispense with the obligation to provide some of the information required by the form.

3. Complaints shall be submitted in one of the official languages of the Union.

CHAPTER Vb

IDENTIFICATION AND PROTECTION OF CONFIDENTIAL INFORMATION

Article 11b

Protection of business secrets and other confidential information

Any person submitting information pursuant to Regulation (EC) No 659/1999 shall clearly indicate which information it considers to be confidential, stating the reasons for such confidentiality, and provide the Commission with a separate non-confidential version of the submission. When information must be provided by a certain deadline, the same deadline shall apply for providing the non-confidential version.

(3) the text in the Annex to this Regulation is added as Annex IV.

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 9 April 2014.

For the Commission
The President
José Manuel BARROSO
ANNEX

ANNEX IV

FORM FOR THE SUBMISSION OF COMPLAINTS CONCERNING ALLEGED UNLAWFUL STATE AID OR MISUSE OF AID

The mandatory fields are marked with a star “*”.

1. Information regarding the complainant

   First name:*  
   Surname:*  
   Address line 1:*  
   Address line 2:  
   Town/City:*  
   County/State/Province:  
   Postcode:*  
   Country:*  
   Telephone:  
   Mobile Telephone:  
   E-mail address:*  
   Fax

2. I am submitting the complaint on behalf of somebody (a person or a firm)

   Yes*    No*

   If yes, please also provide the following information

   Name of the person/firm you represent*:
   Registration nr. of the entity:
   Address line 1:*  
   Address line 2:  
   Town/City:*  
   County/State/Province:  
   Postcode:*  
   Country:*  
   Telephone 1:  
   Telephone 2:  
   E-mail address:*  
   Fax

   Please attach proof that the representative is authorised to act on behalf of this person/firm.*
3. **Please select one of the following options, describing your identity**
   (a) Competitor of the beneficiary or beneficiaries  
   (b) Trade association representing the interests of competitors  
   (c) Non-governmental organisation  
   (d) Trade union  
   (e) EU citizen  
   (f) Other, please specify

Please explain why and to what extent the alleged State aid affects your competitive position/the competitive position of the person/firm you represent. Provide as much concrete evidence as possible.

*Please be aware that, by virtue of Article 20(2) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, only interested parties within the meaning of Article 1(h) of that Regulation may submit formal complaints. Therefore, in the absence of a demonstration that you are an interested party, the present form will not be registered as a complaint, and the information provided therein will be kept as general market information.*

4. **Please select one of the following two options**
   - ☐ Yes, you may reveal my identity  
   - ☐ No, you may not reveal my identity

If not, please specify the reasons:

Confidentiality: If you do not wish your identity or certain documents or information to be disclosed, please indicate this clearly, identify the confidential parts of any documents and give your reasons. In the absence of any indication about confidentiality of your identity or certain documents or information, those elements will be treated as non-confidential and may be shared with the Member State allegedly granting the State aid. The information contained in points 5 and 6 cannot be designated as confidential.

5. **Information regarding the Member State granting the aid**
   *Please be aware: the information provided under this point is regarded as non-confidential.*
   (a) Country: 
   (b) If known, specify which institution or body granted the alleged unlawful State aid:
      - Central government: 
      - Region (please specify): 
      - Other (please specify):
5. Information regarding the alleged aid measure*

Please be aware: the information provided under this point is regarded as non-confidential.

(a) Please provide a description of the alleged aid, and indicate in what form it was granted (loans, grants, guarantees, tax incentives or exemptions etc.).

(b) For what purpose was the alleged aid given (if known)?

(c) What is the amount of the alleged aid (if known)? If you do not have the exact figure, please provide an estimate and as much justifying evidence as possible.

(d) Who is the beneficiary? Please give as much information as possible, including a description of the main activities of the beneficiary/firm(s) concerned.

(e) To your knowledge, when was the alleged aid granted?

(f) Please select one of the following options:

☐ According to my knowledge, the State aid was not notified to the Commission.

☐ According to my knowledge, the State aid was notified, but it was granted before the decision of the Commission. If known, please indicate the notification reference number or indicate when the aid was notified.

☐ According to my knowledge, the State aid was notified and approved by the Commission, but its implementation did not respect the applicable conditions. If known, please indicate the notification reference number or indicate when the aid was notified and approved.

☐ According to my knowledge, the State aid was granted under a block exemption regulation, but its implementation did not respect the applicable conditions.
7. **Grounds of complaint**

Please note that, for a measure to qualify as State aid under Article 107(1) TFEU, the alleged aid has to be granted by a Member State or through State resources, it has to distort or threaten to distort competition by favouring certain undertakings or the production of certain goods, and affect trade between Member States.

(a) Please explain to what extent public resources are involved (if known) and, if the measure was not adopted by a public authority (but for instance by a public undertaking), please explain why, in your view, it is imputable to public authorities of a Member State.

(b) Please explain why, in your opinion, the alleged State aid is selective (i.e. favours certain commercial undertakings or the production of certain goods).

(c) Please explain how, in your opinion, the alleged State aid provides an economic advantage for the beneficiary or beneficiaries.

(d) Please explain why, in your view, the alleged State aid distorts or threatens to distort competition.

(e) Please explain why, in your view, the alleged aid affects trade between Member States.
8. **Compatibility of the aid**

Please indicate the reasons why in your view the alleged aid is not compatible with the internal market.

---

9. **Information on alleged infringement of other rules of European Union law and on other procedures**

(a) If known, please indicate what other rules of European Union law you think have been infringed by the granting of the alleged aid. Please be aware that this does not imply necessarily that those potential infringements will be dealt with within the State aid investigation.

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(b) Have you already approached the Commission’s services or any other European institution concerning the same issue? *

Yes  No

If yes, please attach copies of correspondence.

(c) Have you already approached national authorities or national courts concerning the same issue? *

Yes  No

If yes, please indicate which authorities or courts; also, if there has already been a decision or judgement, please attach a copy (if available); if, on the contrary, the case is still pending, please indicate its reference (if available).

---

(d) Please provide any other information that may be relevant for the assessment of this case.
10. **Supporting documents**

Please list any *documents and evidence* which are submitted in support of the complaint and add annexes if necessary

— Whenever possible, a copy of the national law or other measure which provides the legal basis for the payment of the alleged aid should be provided.

— Whenever possible, please attach any available evidence that the State aid was granted (e.g. press release, published accounts).

— If the complaint is submitted on behalf of someone else (a natural person or a firm) please attach proof that you as a representative are authorised to act.

— Where applicable, please attach copies of all previous correspondence with the European Commission or any other European or national institution concerning the same issue.

— If the issue has already been dealt with by a national court/authority, please attach a copy of the judgement/decision, if available.

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*I hereby declare that all the information in this form and annexes is provided in good faith.*

Place, date and signature of complainant*
COMMISSION REGULATION (EC) No 794/2004

of 21 April 2004


(OJ L 140, 30.4.2004, p. 1)

Amended by:

Official Journal

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Corrected by:

| C3   | Corrigendum, OJ L 44, 15.2.2007, p. 3 (1935/2006) |
COMMISSION REGULATION (EC) No 794/2004
of 21 April 2004

implementing Council Regulation (EC) No 659/1999 laying down
detailed rules for the application of Article 93 of the EC Treaty

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 659/1999 of 22 March
1999 laying down detailed rules for the application of Article 93 of the
EC Treaty (1), and in particular Article 27 thereof,

After consulting the Advisory Committee on State Aid,

Whereas:

(1) In order to facilitate the preparation of State aid notifications by
Member States, and their assessment by the Commission, it is
desirable to establish a compulsory notification form. That form
should be as comprehensive as possible.

(2) The standard notification form as well as the summary infor-
mation sheet and the supplementary information sheets should
cover all existing guidelines and frameworks in the state aid
field. They should be subject to modification or replacement in
accordance with the further development of those texts.

(3) Provision should be made for a simplified system of notification
for certain alterations to existing aid. Such simplified
arrangements should only be accepted if the Commission has
been regularly informed on the implementation of the existing
aid concerned.

(4) In the interests of legal certainty it is appropriate to make it clear
that small increases of up to 20 % of the original budget of an aid
scheme, in particular to take account of the effects of inflation,
should not need to be notified to the Commission as they are
unlikely to affect the Commission’s original assessment of the
compatibility of the scheme, provided that the other conditions of
the aid scheme remain unchanged.

(5) Article 21 of Regulation (EC) No 659/1999 requires Member
States to submit annual reports to the Commission on all
existing aid schemes or individual aid granted outside an
approved aid scheme in respect of which no specific reporting
obligations have been imposed in a conditional decision.

(6) For the Commission to be able to discharge its responsibilities for
the monitoring of aid, it needs to receive accurate information
from Member States about the types and amounts of aid being
granted by them under existing aid schemes. It is possible to
simplify and improve the arrangements for the reporting of
State aid to the Commission which are currently described in
the joint procedure for reporting and notification under the EC
Treaty and under the World Trade Organisation (WTO)
Agreement set out in the Commission’s letter to Member States
of 2 August 1995. The part of that joint procedure relating to
Member States reporting obligations for subsidy notifications
under Article 25 of the WTO Agreement on Subsidies and Coun-

(1) OJ L 83, 27.3.1999, p. 1. Regulation as amended by the 2003 Act of
Accession.
tervailing measures and under Article XVI of GATT 1994, adopted on 21 July 1995 is not covered by this Regulation.

(7) The information required in the annual reports is intended to enable the Commission to monitor overall aid levels and to form a general view of the effects of different types of aid on competition. To this end, the Commission may also request Member States to provide, on an ad hoc basis, additional data for selected topics. The choice of subject matter should be discussed in advance with Member States.

(8) The annual reporting exercise does not cover the information, which may be necessary in order to verify that particular aid measures respect Community law. The Commission should therefore retain the right to seek undertakings from Member States, or to attach to decisions conditions requiring the provision of additional information.

(9) It should be specified that time-limits for the purposes of Regulation (EC) No 659/1999 should be calculated in accordance with Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits (1), as supplemented by the specific rules set out in this Regulation. In particular, it is necessary to identify the events, which determine the starting point for time-limits applicable in State aid procedures. The rules set out in this Regulation should apply to pre-existing time-limits which will continue to run after the entry into force of this Regulation.

(10) The purpose of recovery is to re-establish the situation existing before aid was unlawfully granted. To ensure equal treatment, the advantage should be measured objectively from the moment when the aid is available to the beneficiary undertaking, independently of the outcome of any commercial decisions subsequently made by that undertaking.

(11) In accordance with general financial practice it is appropriate to fix the recovery interest rate as an annual percentage rate.

(12) The volume and frequency of transactions between banks results in an interest rate that is consistently measurable and statistically significant, and should therefore form the basis of the recovery interest rate. The inter-bank swap rate should, however, be adjusted in order to reflect general levels of increased commercial risk outside the banking sector. On the basis of the information on inter-bank swap rates the Commission should establish a single recovery interest rate for each Member State. In the interest of legal certainty and equal treatment, it is appropriate to fix the precise method by which the interest rate should be calculated, and to provide for the publication of the recovery interest rate applicable at any given moment, as well as relevant previously applicable rates.

(13) A State aid grant may be deemed to reduce a beneficiary undertaking’s medium-term financing requirements. For these purposes, and in line with general financial practice, the medium-term may be defined as five years. The recovery interest rate should therefore correspond to an annual percentage rate fixed for five years.

(14) Given the objective of restoring the situation existing before the aid was unlawfully granted, and in accordance with general financial practice, the recovery interest rate to be fixed by the Commission should be annually compounded. For the same reasons, the recovery interest rate applicable in the first year of the recovery period should be applied for the first five years of

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the recovery period, and the recovery interest rate applicable in the sixth year of the recovery period for the following five years.

(15) This Regulation should apply to recovery decisions notified after the date of entry into force of this Regulation,

HAS ADOPTED THIS REGULATION:

CHAPTER I
SUBJECT MATTER AND SCOPE

Article 1
Subject matter and scope

1. This Regulation sets out detailed provisions concerning the form, content and other details of notifications and annual reports referred to in Regulation (EC) No 659/1999. It also sets out provisions for the calculation of time limits in all procedures concerning State aid and of the interest rate for the recovery of unlawful aid.

2. This Regulation shall apply to aid in all sectors.

CHAPTER II
NOTIFICATIONS

Article 2
Notification forms

Without prejudice to Member States’ obligations to notify state aids in the coal sector under Commission Decision 2002/871/CE (1), notifications of new aid pursuant to Article 2(1) of Regulation (EC) No 659/1999, other than those referred to in Article 4(2), shall be made on the notification form set out in Part I of Annex I to this Regulation. Supplementary information needed for the assessment of the measure in accordance with regulations, guidelines, frameworks and other texts applicable to State aid shall be provided on the supplementary information sheets set out in Part III of Annex I.

Whenever the relevant guidelines or frameworks are modified or replaced, the Commission shall adapt the corresponding forms and information sheets.

Article 3
Transmission of notifications

1. The notification shall be transmitted to the Commission by means of the electronic validation carried out by the person designated by the Member State. Such validated notification shall be considered as sent by the Permanent Representative.

2. The Commission shall address its correspondence to the Permanent Representative of the Member State concerned, or to any other address designated by that Member State.

3. As from 1 July 2008, notifications shall be transmitted electronically via the web application State Aid Notification Interactive (SANI).

All correspondence in connection with a notification shall be transmitted electronically via the secured e-mail system Public Key Infrastructure (PKI).

4. In exceptional circumstances and upon the agreement of the Commission and the Member State concerned, an agreed communication channel other than those referred to in paragraph 3 may be used for submission of a notification or any correspondence in connection with a notification.

In the absence of such an agreement, any notification or correspondence in connection with a notification sent to the Commission by a Member State through a communication channel other than those referred to in paragraph 3 shall not be considered as submitted to the Commission.

5. Where the notification or correspondence in connection with a notification contains confidential information, the Member State concerned shall clearly identify such information and give reasons for its classification as confidential.

6. The Member States shall refer to the State aid identification number allocated to an aid scheme by the Commission in each grant of aid to a final beneficiary.

The first subparagraph shall not apply to aid granted through fiscal measures.

Article 4

Simplified notification procedure for certain alterations to existing aid

1. For the purposes of Article 1(c) of Regulation (EC) No 659/1999, an alteration to existing aid shall mean any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market. However an increase in the original budget of an existing aid scheme by up to 20 % shall not be considered an alteration to existing aid.

2. The following alterations to existing aid shall be notified on the simplified notification form set out in Annex II:

(a) increases in the budget of an authorised aid scheme exceeding 20 %;

(b) prolongation of an existing authorised aid scheme by up to six years, with or without an increase in the budget;

(c) tightening of the criteria for the application of an authorised aid scheme, a reduction of aid intensity or a reduction of eligible expenses;

The Commission shall use its best endeavours to take a decision on any aid notified on the simplified notification form within a period of one month.

3. The simplified notification procedure shall not be used to notify alterations to aid schemes in respect of which Member States have not submitted annual reports in accordance with Article 5, 6, and 7, unless the annual reports for the years in which the aid has been granted are submitted at the same time as the notification.
CHAPTER III

ANNUAL REPORTS

Article 5

Form and content of annual reports

1. Without prejudice to the second and third subparagraphs of this Article and to any additional specific reporting requirements laid down in a conditional decision adopted pursuant to Article 7(4) of Regulation (EC) No 659/1999, or to the observance of any undertakings provided by the Member State concerned in connection with a decision to approve aid, Member States shall compile the annual reports on existing aid schemes referred to in Article 21(1) of Regulation (EC) No 659/1999 in respect of each whole or part calendar year during which the scheme applies in accordance with the standardised reporting format set out in Annex IIIA.

Annex IIIB sets out the format for annual reports on existing aid schemes relating to the production, processing and marketing of agricultural products listed in Annex I of the Treaty.

Annex IIIC sets out the format for annual reports on existing aid schemes for state aid relating to the production, processing or marketing of fisheries products listed in Annex I of the Treaty.

2. The Commission may ask Member States to provide additional data for selected topics, to be discussed in advance with Member States.

Article 6

Transmission and publication of annual reports

1. Each Member State shall transmit its annual reports to the Commission in electronic form no later than 30 June of the year following the year to which the report relates.

In justified cases Member States may submit estimates, provided that the actual figures are transmitted at the very latest with the following year’s data.

2. Each year the Commission shall publish a State aid synopsis containing a synthesis of the information contained in the annual reports submitted during the previous year.

Article 7

Status of annual reports

The transmission of annual reports shall not be considered to constitute compliance with the obligation to notify aid measures before they are put into effect pursuant to Article 88(3) of the Treaty, nor shall such transmission in any way prejudice the outcome of an investigation into allegedly unlawful aid in accordance with the procedure laid down in Chapter III of Regulation (EC) No 659/1999.
CHAPTER IV
TIME-LIMITS

Article 8
Calculation of time-limits

1. Time-limits provided for in Regulation (EC) No 659/1999 and in this Regulation or fixed by the Commission pursuant to Article 88 of the Treaty shall be calculated in accordance with Regulation (EEC, Euratom) No 1182/71, and the specific rules set out in paragraphs 2 to 5 of this Article. In case of conflict, the provisions of this regulation shall prevail.

2. Time limits shall be specified in months or in working days.

3. With regard to timelimits for action by the Commission, the receipt of the notification or subsequent correspondence in accordance with Article 3(1) and Article 3(3) of this Regulation shall be the relevant event for the purpose of Article 3(1) of Regulation (EEC, Euratom) No 1182/71.

4. With regard to timelimits for action by Member States, the receipt of the relevant notification or correspondence from the Commission in accordance with Article 3(2) of this Regulation shall be the relevant event for the purposes of Article 3(1) of Regulation (EEC, Euratom) No 1182/71.

5. With regard to the time-limit for the submission of comments following initiation of the formal investigation procedure referred to in Art. 6(1) of Regulation (EC) No 659/1999 by third parties and those Member States which are not directly concerned by the procedure, the publication of the notice of initiation in the Official Journal of the European Union shall be the relevant event for the purposes of Article 3(1) of Regulation (EEC, Euratom) No 1182/71.

6. Any request for the extension of a time-limit shall be duly substantiated, and shall be submitted in writing to the address designated by the party fixing the time-limit at least two working days before expiry.

CHAPTER V
INTEREST RATE FOR THE RECOVERY OF UNLAWFUL AID

Article 9
Method for fixing the interest rate

1. Unless otherwise provided for in a specific decision, the interest rate to be used for recovering State aid granted in breach of Article 88(3) of the Treaty shall be an annual percentage rate which is fixed by the Commission in advance of each calendar year.

2. The interest rate shall be calculated by adding 100 basis points to the one-year money market rate. Where those rates are not available, the three-month money market rate will be used, or in the absence thereof, the yield on State bonds will be used.

3. In the absence of reliable money market or yield on stock bonds or equivalent data or in exceptional circumstances the Commission may, in close co-operation with the Member State(s) concerned, fix a recovery rate on the basis of a different method and on the basis of the information available to it.
4. The recovery rate will be revised once a year. The base rate will be calculated on the basis of the one-year money market recorded in September, October and November of the year in question. The rate thus calculated will apply throughout the following year.

5. In addition, to take account of significant and sudden variations, an update will be made each time the average rate, calculated over the three previous months, deviates more than 15% from the rate in force. This new rate will enter into force on the first day of the second month following the months used for the calculation.

Article 10

Publication

The Commission shall publish current and relevant historical State aid recovery interest rates in the **Official Journal of the European Union** and for information on the Internet.

Article 11

Method for applying interest

1. The interest rate to be applied shall be the rate applicable on the date on which unlawful aid was first put at the disposal of the beneficiary.

2. The interest rate shall be applied on a compound basis until the date of the recovery of the aid. The interest accruing in the previous year shall be subject to interest in each subsequent year.

3. The interest rate referred to in paragraph 1 shall be applied throughout the whole period until the date of recovery. However, if more than one year has elapsed between the date on which the unlawful aid was first put at the disposal of the beneficiary and the date of the recovery of the aid, the interest rate shall be recalculated at yearly intervals, taking as a basis the rate in force at the time of recalculation.

CHAPTER VI

FINAL PROVISIONS

Article 12

Review

The Commission shall in consultation with the Member States, review the application of this Regulation within four years after its entry into force.

Article 13

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the **Official Journal of the European Union**.

Chapter II shall apply only to those notifications transmitted to the Commission more than five months after the entry into force of this Regulation.
Chapter III shall apply to annual reports covering aid granted from 1 January 2003 onwards.

Chapter IV shall apply to any time limit, which has been fixed but which has not yet expired on the date of entry into force of this Regulation.

Articles 9 and 11 shall apply in relation to any recovery decision notified after the date of entry into force of this Regulation.

This Regulation shall be binding in its entirety and be directly applicable in all Member States.
PART I

GENERAL INFORMATION

STATUS OF THE NOTIFICATION

Does the information transmitted on this form concern:

☐ a notification pursuant to Article 88(3) of the EC Treaty?

☐ a possible unlawful aid (')?

If yes, please specify the date of putting into effect of the aid. Please complete this form, as well as the relevant supplementary forms.

☐ a non-aid measure which is notified to the Commission for reasons of legal certainty?

Please indicate below the reasons why the notifying Member State considers that the measure does not constitute State aid in the meaning of Article 87(1) of the EC Treaty. Please complete the relevant parts of this form and provide all necessary supporting documentation.

A measure will not constitute State aid if one of the conditions laid down in Article 87(1) EC Treaty is not fulfilled. Please provide a full assessment of the measure in the light of the following criteria focusing in particular on the criterion which you consider not to be met:

— no transfer of public resources (For example, if you consider the measure is not imputable to the State or where you consider that regulatory measures without transfer of public resources will be put in place),

— no advantage (For example, where the private market investor principle is respected).

— no selectivity/specificity (For example, where the measure is available to all enterprises, in all sectors of the economy and without any territorial limitation and without discretion).

— no distortion of competition/no affectation of intra-community trade (For example, where the activity is not of an economic nature or where the economic activity is purely local).

1. Identification of the aid grantor

1.1. Member State concerned: .......................................................... ..........................................................

1.2. Region(s) concerned (if applicable): .......................................................... ..........................................................

1.3. Responsible contact person:

Name: ........................................................................................................

Address: ...................................................................................................

Telephone: ..................................................................................................

Fax: ...........................................................................................................

E-mail: ........................................................................................................

1.4. Responsible contact person at the Permanent Representation:

Name: ........................................................................................................

Telephone: ..................................................................................................

Fax: ...........................................................................................................

E-mail: ........................................................................................................

1.5. If you wish that a copy of the official correspondence sent by the Commission to the Member State should be forwarded to other national authorities, please indicate here their name and address:

Name: ........................................................................................................

Address: ...................................................................................................

........................................................................................................

........................................................................................................

1.6. Indicate Member State reference you wish to be included in the correspondence from the Commission:

---------------------------------------------------------------

1.7. Please indicate the name and the address of the granting authority:

---------------------------------------------------------------

---------------------------------------------------------------

2. Identification of the aid

2.1. Title of the aid (or name of company beneficiary in case of individual aid)

---------------------------------------------------------------

2.2. Brief description of the objective of the aid.

Please indicate primary objective and, if applicable, secondary objective(s):

<table>
<thead>
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<th>Primary objective</th>
<th>Secondary objective (‡)</th>
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<tbody>
<tr>
<td>(please tick one only)</td>
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<tr>
<td>Regional development</td>
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<td>Training</td>
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<td>Risk capital</td>
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<td>Services of general economic interest</td>
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<td>Sectoral development (‡)</td>
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<td>Social support to individual consumers</td>
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<tr>
<td>Compensation of damage caused by natural disasters or exceptional occurrences</td>
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<tr>
<td>Execution of an important project of common European interest</td>
<td></td>
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<tr>
<td>Remedy for a serious disturbance in the economy</td>
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<tr>
<td>Heritage conservation</td>
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<tr>
<td>Culture</td>
<td></td>
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</table>

‡ A secondary objective is one for which, in addition to the primary objective, the aid will be exclusively earmarked. For example, a scheme for which the primary objective is research and development may have as a secondary objective small and medium-sized enterprises (SMEs) if the aid is earmarked exclusively for SMEs. The secondary objective may also be sectoral, in the case for example of a research and development scheme in the steel sector.

‡ Please specify sector in point 4.2.
2.3. Scheme — Individual aid (*)

2.3.1. Does the notification relate to an aid scheme?

☐ yes ☐ no

— If yes, does the scheme amend an existing aid scheme?

☐ yes ☐ no

— If yes, are the conditions laid down for the simplified notification procedure pursuant to Article 4(2) of the Implementation Regulation (EC) No 794/2004 fulfilled?

☐ yes ☐ no

— If yes, please use and complete the information requested by the simplified notification form (see Annex II).

— If no, please continue with this form and specify whether the original scheme which is being amended was notified to the Commission.

☐ yes ☐ no

— If yes, please specify:

Aid number: ..........................................................

Date of Commission approval (reference of the letter of the Commission (SG, OF, DG, ...):

..........................................................

Duration of the original scheme: ..........................................................

................................................................

Please specify which conditions are being amended in relation to the original scheme and why:

................................................................

2.3.2. Does the notification relate to individual aid?

☐ yes ☐ no

— If yes, please tick the following appropriate box:

☐ aid based on a scheme which should be individually notified

Reference of the authorised scheme:

Title: .............................................................................................

Aid number: ....................................................................................

Letter of Commission approval: ..........................................................

..........................................................

☐ individual aid not based on a scheme

2.3.3. Does the notification relate to an individual aid or scheme notified pursuant to an exemption regulation? If yes, please tick the following appropriate box:

☐ Commission Regulation (EC) No 70/2001 on the application of Articles 87 and 88 EC Treaty to State aid to small and medium-sized enterprises (*). Please use the supplementary information sheet under part III, 1

☐ Commission Regulation No 68/2001 on the application of Articles 87 and 88 EC Treaty to training aid (**). Please use the supplementary information sheet under part III, 2


Commission Regulation (EC) No 2204/2002 on the application of Articles 87 and 88 of the Treaty to State aid for employment (1). Please use the supplementary information sheet under part III, 3


3. National legal basis

3.1. Please list the national legal basis including the implementing provisions and their respective sources of references:

Title: ......................................................................................................................................................................................
......................................................................................................................................................................................
......................................................................................................................................................................................
......................................................................................................................................................................................
Reference (where applicable): ................................................................................................................................................
......................................................................................................................................................................................
......................................................................................................................................................................................
......................................................................................................................................................................................

3.2. Please indicate the document(s) enclosed with this notification:

☐ A copy of the relevant extracts of the final text(s) of the legal basis (and a web link, if possible)

☐ A copy of the relevant extracts of the draft text(s) of the legal basis (and a web link, if existing)

3.3. In case of a final text, does the final text contain a clause whereby the aid granting body can only grant after the Commission has cleared the aid (standstill clause)?

☐ yes ☐ no

3.4. Access to full text of schemes — in case of an aid scheme please:

— undertake to publish the full text of the final aid schemes on the Internet,

☐ yes

Please provide the Internet address: ......................................................................................................................................

— confirm that the scheme will not be applied before the information is published on the Internet,

☐ yes

4. Beneficiaries

4.1. Location of the beneficiary(ies):

☐ in (an) unassisted region(s): ..........................................................................................................................................................

☐ in (a) region(s) eligible for assistance under Article 87(3)(c) of the EC Treaty (specify at NUTS-level 3 or lower): ............................................................................................................................................................

☐ in (a) region(s) eligible for assistance under Article 87(3)(a) of the EC Treaty (specify at NUTS-level 2 or lower): ............................................................................................................................................................

☐ mixed: specify .................................................................................................................................................................


4.2. Sector(s) of the beneficiary(ies):

☐ Not sector specific

☐ Sector specific, please specify according to NACE rev. 2 classification (\(^{(*)}\)):

4.3. In case of an individual aid:

Name of the beneficiary: ………………………………………………………………………………………………………………………………

Type of beneficiary: ………………………………………………………………………………………………………………………………………

☐ SME

Number of employees: ………………………………………………………………………………………………………………………………

Annual turnover: ………………………………………………………………………………………………………………………………………

Annual balance-sheet: …………………………………………………………………………………………………………………………………

Independence: …………………………………………………………………………………………………………………………………………

(please attach a solemn declaration in line with the Commission Recommendation on SME (\(^{(*)}\)) or provide any other evidence to demonstrate the above criteria): …………………………………………………………………...

☐ large enterprise

☐ firm in difficulties (\(^{(**)}\))

4.4. In case of an aid scheme:

Type of beneficiaries:

☐ all firms (large firms and small and medium-sized enterprises)

☐ only large enterprises

☐ small and medium-sized enterprises (\(^{(*)}\))

☐ medium-sized enterprises

☐ small enterprises

☐ micro enterprises

☐ the following beneficiaries: ……………………………………………………………………………………………………………………………

Estimated number of beneficiaries:

☐ under 10

☐ from 11 to 50

☐ from 51 to 100

☐ from 101 to 500

☐ from 501 to 1 000

☐ over 1 000


\(^{(\!*)}\) As defined in Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

5. **Amount of aid/Annual expenditure (**)**

In case of an individual aid, indicate the overall amount of each measure concerned:

__________________________________________________________________________________________________________________________________________

In case of a scheme, indicate the annual amount of the budget planned and the overall amount:

__________________________________________________________________________________________________________________________________________

For tax measures, please indicate the estimated annual and overall revenue losses due to tax concessions for the period covered by the notification:

__________________________________________________________________________________________________________________________________________

If the budget is not adopted annually, please specify what period it covers:

__________________________________________________________________________________________________________________________________________

If the notification concerns changes to an existing scheme, please give the budgetary effects of the notified changes to the scheme:

__________________________________________________________________________________________________________________________________________

6. **Form of the aid and means of funding**

Specify the form of the aid made available to the beneficiary (where appropriate, for each measure):

- [ ] Direct grant
- [ ] Reimbursable grant
- [ ] Soft loan (including details of how the loan is secured)
- [ ] Interest subsidy
- [ ] Tax advantage. Please specify:
  - [ ] Tax allowance
  - [ ] Tax base reduction
  - [ ] Tax rate reduction
  - [ ] Tax deferment
  - [ ] Other: ..........................................................................................................................
- [ ] Reduction of social security contributions
- [ ] Provision of risk capital
- [ ] Other forms of equity intervention. Please specify: ..........................................................
- [ ] Debt write-off
- [ ] Guarantee (including amongst others information on the loan or other financial transaction covered by the guarantee, the security required and the premium to be paid)
- [ ] Other. Please specify: ...........................................................................................................
Specify the financing of the aid: if the aid is not financed through the general budget of the State/region/municipality, please explain its way of financing:

☐ Through paraﬁscal charges or taxes aﬀected to a beneﬁciary, which is not the State. Please provide full details of the charges and the products/activities on which they are levied. Specify in particular whether products imported from other Member States are liable to the charges. Annex a copy of the legal basis for the imposition of the charges:

☐ Accumulated reserves
☐ Public enterprises
☐ Other (please specify):

7. Duration
7.1. In the case of an individual aid:
Indicate the planned date to put into eﬀect the aid. If the aid will be granted in tranches, indicate the planned date of each tranche:

Specify the duration of the measure for which the aid is granted, if applicable:

7.2. In the case of a scheme:
Indicate the planned date from which the aid may be granted:

Indicate the planned last date until which aid may be granted:

If the duration exceeds six years, please demonstrate that a longer time period is indispensable to achieve the objective(s) of the scheme:

8. Cumulation of diﬀerent types of aid
Can the aid be cumulated with aid received from other local, regional, national or Community schemes to cover the same eligible costs?

☐ yes ☐ no

If so, describe the mechanisms put in place in order to ensure that the cumulation rules are respected:

9. Professional conﬁdentiality
Does the notification contain conﬁdential information which should not be disclosed to third parties?

☐ yes ☐ no

If so, please indicate which parts are conﬁdential and explain why:

Does the Member State submit a non conﬁdential version of the notification on a voluntary basis?

☐ yes ☐ no

If yes, the Commission may publish this version without further asking the Member State to conﬁrm its content.
10. **Compatibility of the aid**

10.1. Please identify which of the existing Regulations, frameworks, guidelines and other texts applicable to State aid provide an explicit legal basis for the authorisation of the aid (where appropriate please specify for each measure) and complete the relevant supplementary information sheet(s) in part III:

- SME aid
  - Notification of an individual aid or an aid scheme pursuant to Article 6a of Regulation (EC) No 70/2001, as amended by Regulation (EC) No 364/2004
  - Notification for legal certainty
  - Aid for SMEs in the agricultural sector

- Training aid
  - Notification for legal certainty

- Employment aid
  - Notification of an individual aid pursuant to Article 9 of Regulation (EC) No 2204/2002
  - Notification of a scheme pursuant to Article 9 of Regulation (EC) No 2204/2002
  - Notification for legal certainty

- Regional aid
  - Notification of aid pursuant to Guidelines on national regional aid for 2007-2013 (**)
  - Notification of aid pursuant to point 64 of Guidelines on national regional aid for 2007-2013 (large investment projects)
  - Notification of aid pursuant to Article 7 of Regulation (EC) No 1628/2006
  - Notification for legal certainty

- Research and development and innovation aid
- Aid for rescuing firms in difficulty
- Aid for restructuring firms in difficulty
- Aid for audiovisual production
- Environmental protection aid
- Risk capital aid
- Aid in the agricultural sector
- Aid in the fisheries sector
- Aid in the transport sector
- Shipbuilding aid

10.2. Where the existing Regulations, frameworks, guidelines or other texts applicable to State aid do not provide an explicit basis for the approval of any of the aid covered by this form, please provide a fully reasoned justification as to why the aid could be considered as compatible with the EC Treaty, referring to the applicable exemption clause of the EC Treaty (Article 86(2), Article 87(2)(a) or (b), Article 87(3)(a), (b), (c) or (d)) as well as other specific provisions relating to Agriculture and Transport.

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10.3. Where the existing Regulations, frameworks, guidelines or other texts applicable to State aid do not provide an explicit basis for the approval and in so far that it is not requested by the relevant supplementary information sheet(s) in part III, please provide the following information concerning the likely impact of the notified measure on competition and trade between Member States.

This information is necessary to complete the assessment made by the Commission which balances the positive impact of the aid measure (reaching an objective of common interest) against its potentially negative side effects (distortions of trade and competition).

10.3.1. For individual aid:

(A) Impact on competition: Please specify and describe the product markets on which the aid is likely to have a significant impact, the structure and dynamics of those markets and the indicative market share of the beneficiary:

..................................................................................................................................................

(B) Impact on trade between Member States. Please provide information on the effects on trade (shift of trade flows and location of economic activity):

..................................................................................................................................................

10.3.2. For aid schemes:

(A) Impact on competition: Please specify and describe the product markets on which the aid scheme is likely to have a significant impact, the structure and dynamics of those markets:

..................................................................................................................................................

(B) Impact on trade between Member States. Please provide information on the effects on trade (shift of trade flows and location of economic activity):

..................................................................................................................................................

11. Outstanding recovery orders

11.1. In the case of individual aid:

The authorities of the Member State commit to suspend the payment of the notified aid if the beneficiary still has at its disposal an earlier unlawful aid that was declared incompatible by a Commission Decision (either concerning an individual aid or an aid scheme), until that beneficiary has reimbursed or paid into a blocked account the total amount of unlawful and incompatible aid and the corresponding recovery interest.

☐ yes ☐ no

11.2. In the case of aid schemes:

The authorities of the Member State commit to suspend the payment of any aid under the notified aid scheme to any undertaking that has benefited from earlier unlawful aid declared incompatible by a Commission Decision, until that undertaking has reimbursed or paid into a blocked account the total amount of unlawful and incompatible aid and the corresponding recovery interest.

☐ yes ☐ no

12. Other information

Please indicate here any other information you consider relevant to the assessment of the measure(s) concerned under State aid rules.

13. Attachments

Please list here all documents which are attached to the notification and provide paper copies or direct internet links to the documents concerned.

14. Declaration

I certify that to the best of my knowledge the information provided on this form, its annexes and its attachments is accurate and complete.

Date and place of signature: ........................................................................................................

Signature: ....................................................................................................................................

Name and position of person signing: ........................................................................................
SUPPLEMENTARY INFORMATION SHEETS

To be completed as necessary depending on the type of aid concerned:

1. SME aid
2. Training aid
3. Employment aid
4. Regional aid
5. Aid coming under the multisectoral framework
6. Research and development aid
   a) in the case of a scheme
   b) in the case of individual aid
7. Aid for rescuing firms in difficulty
   a) in the case of a scheme
   b) in the case of individual aid
8. Aid for restructuring firms in difficulty
   a) in the case of a scheme
   b) in the case of individual aid
9. Aid for audio-visual production
10. Environmental protection aid
11. Risk capital aid
12. Aid in the agricultural sector
   a) Aid for agriculture
      i. Aid for investment in agricultural holdings
      ii. Aid for investments in connection with the processing and marketing of agricultural products
   b) Agri-environmental aid
c) Aid to compensate for handicaps in the less favoured areas
d) Aid for the setting up of young farmers
e) Aid for early retirement or for the cessation of farming activities
f) Aid for closing production, processing and marketing capacity
g) Aid for producer groups
h) Aid to compensate for damage to agricultural production or the means of agricultural production
i) Aid for land reparcelling
j) Aid for the production and marketing of quality agricultural products
k) Aid for the provision of technical support in the agricultural sector
l) Aid for the livestock sector
m) Aid for the outermost regions and the Aegean Islands
n) Aid in the form of subsidised short-term loans
o) Aid for the promotion and advertising of agricultural and certain non-agricultural products
p) Aid for disaster and restructuring firms in difficulty
q) Aid for TSE tests; fallen stock and slaughterhouse waste
13. Aid in the transport sector
    a) Individual aid for restructuring firms in difficulty in the aviation sector
    b) Aid for transport infrastructure
c) Aid for maritime transport
d) Aid for combined transport

14. Aid to the fisheries sector

[Note: The document contains a page number or identifier at the beginning, which is not relevant to the content of the supplementary information sheets.]
ANNEX II

SIMPLIFIED NOTIFICATION FORM

This form may be used for the simplified notification pursuant to Article 4(2) of Commission Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (1).

1. Prior approved aid scheme (2).
   1.1. Aid number allocated by the Commission: .................................................................
   1.2. Title: ......................................................................................................................
   1.3. Date of approval [by reference to the letter of the Commission SG(...]: ................................
   1.4. Publication in the Official Journal of the European Union: ...........................................
   1.5. Primary objective (please specify one): .........................................................................
   1.6. Legal basis: .............................................................................................................
   1.7. Overall budget: ........................................................................................................
   1.8. Duration: ................................................................................................................

2. Instrument subject to notification
   □ New budget (please specify the overall as well as the annual budget in the respective national currency): .............................................................................................................
   □ New duration (please specify the starting date from which the aid may be granted and the last date until which the aid may be granted): .................................................................
   □ Tightening of criteria (please indicate if the amendment concerns a reduction of aid intensity or eligible expenses and specify details): ........................................................................

3. Validity of commitments
   □ Please confirm that the commitments provided by the Member State for the purposes of the prior approved aid scheme are valid in their entirety also for the new notified measure.

Please attach a copy (or a web link) of the relevant extracts of the final text(s) of the legal basis.

(2) If the aid scheme has been notified to the Commission on more than one occasion, please provide details for the latest complete notification that has been approved by the Commission.
ANNEX III A

STANDARDISED REPORTING FORMAT FOR EXISTING STATE AID

(This format covers all sectors except agriculture)

With a view to simplifying, streamlining and improving the overall reporting system for State aid, the existing Standardised Reporting Procedure shall be replaced by an annual updating exercise. The Commission shall send a pre-formatted spreadsheet, containing detailed information on all existing aid schemes and individual aid, to the Member States by 1 March each year. Member States shall return the spreadsheet in an electronic format to the Commission by 30 June of the year in question. This will enable the Commission to publish State aid data in year t for the reporting period t-1 (1).

The bulk of the information in the pre-formatted spreadsheet shall be pre-completed by the Commission on the basis of data provided at the time of approval of the aid. Member States shall be required to check and, where necessary, modify the details for each scheme or individual aid, and to add the annual expenditure for the latest year (t-1). In addition, Member States shall indicate which schemes have expired or for which all payments have stopped and whether or not a scheme is co-financed by Community Funds.

Information such as the objective of the aid, the sector to which the aid is directed, etc shall refer to the time at which the aid is approved and not to the final beneficiaries of the aid. For example, the primary objective of a scheme which, at the time the aid is approved, is exclusively earmarked for small and medium-sized enterprises shall be aid for small and medium-sized enterprises. However, another scheme for which all aid is ultimately awarded to small and medium-sized enterprises shall not be regarded as such if, at the time the aid is approved, the scheme is open to all enterprises.

The following parameters shall be included in the spreadsheet. Parameters 1-3 and 6-12 shall be pre-completed by the Commission and checked by the Member States. Parameters 4, 5 and 13 shall be completed by the Member States.

1. Title
2. Aid number
3. All previous aid numbers (e.g., following the renewal of a scheme)
4. Expiry
   Member States should indicate those schemes which have expired or for which all payments have stopped.
5. Co-financing
   Although Community funding itself is excluded, total State aid for each Member State shall include aid measures that are co-financed by Community funding. In order to identify which schemes are co-financed and estimate how much such aid represents in relation to overall State aid, Member States are required to indicate whether or not the scheme is co-financed and if so the percentage of aid that is co-financed. If this is not possible, an estimate of the total amount of aid that is co-financed shall be provided.
6. Sector
   The sectoral classification shall be based largely on NACE (2) at the [three-digit level].
7. Primary objective
8. Secondary objective
   A secondary objective is one for which, in addition to the primary objective, the aid (or a distinct part of it) was exclusively earmarked at the time the aid was approved. For example, a scheme for which the primary objective is research and development may have as a secondary objective small and medium-sized enterprises (SMEs) if the aid is earmarked exclusively for SMEs. Another scheme for which the primary objective is SMEs may have as secondary objectives training and employment if, at the time the aid was approved, the aid is earmarked for x% training and y% employment.

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(1) t is the year in which the data are requested.
(2) NACE Rev.1.1 is the Statistical classification of economic activities in the European Community.
9. Region(s)

Aid may, at the time of approval, be exclusively earmarked for a specific region or group of regions. Where appropriate, a distinction should be made between the Article 87(3)a regions and the Article 87(3)c regions. If the aid is earmarked for one particular region, this should be specified at NUTS (1) level II.

10. Category of aid instrument(s)

A distinction shall be made between six categories (Grant, Tax reduction/exemption, Equity participation, Soft loan, Tax deferral, Guarantee).

11. Description of aid instrument in national language

12. Type of aid

A distinction shall be made between three categories: Scheme, Individual application of a scheme, Individual aid awarded outside of a scheme (ad hoc aid).

13. Expenditure

As a general rule, figures should be expressed in terms of actual expenditure (or actual revenue foregone in the case of tax expenditure). Where payments are not available, commitments or budget appropriations shall be provided and flagged accordingly. Separate figures shall be provided for each aid instrument within a scheme or individual aid (e.g. grant, soft loans, etc.) Figures shall be expressed in the national currency in application at the time of the reporting period. Expenditure shall be provided for t-1, t-2, t-3, t-4, t-5.

(1) NUTS is the nomenclature of territorial units for statistical purposes in the Community.
ANNEX III C

INFORMATION TO BE CONTAINED IN THE ANNUAL REPORT TO
BE PROVIDED TO THE COMMISSION

The reports shall be provided in computerised form. They shall contain the
following information:

1. Title of aid scheme, Commission aid number and reference of the
Commission decision

2. Expenditure. The figures have to be expressed in euros or, if applicable,
national currency. In the case of tax expenditure, annual tax losses have to
be reported. If precise figures are not available, such losses may be
estimated. For the year under review indicate separately for each aid
instrument within the scheme (e.g. grant, soft loan, guarantee, etc.):

2.1. amounts committed, (estimated) tax losses or other revenue forgone, data on
guarantees, etc. for new assisted projects. In the case of guarantee schemes,
the total amount of new guarantees handed out should be provided;

2.2. actual payments, (estimated) tax losses or other revenue forgone, data on
guarantees, etc. for new and current projects. In the case of guarantee
schemes, the following should be provided: total amount of outstanding
guarantees, premium income, recoveries, indemnities paid out, operating
result of the scheme under the year under review;

2.3. number of assisted projects and/or enterprises;

2.4. estimated overall amount of:
   — aid granted for the permanent withdrawal of fishing vessels through their
     transfer to third countries;
   — aid granted for the temporary cessation of fishing activities;
   — aid granted for the renewal of fishing vessels;
   — aid granted for modernisation of fishing vessels;
   — aid granted for the purchase of used vessels;
   — aid granted for socio-economic measures;
   — aid granted to make good damage caused by natural disasters or excep-
tional occurrences;
   — aid granted to outermost regions;
   — aid granted through parafiscal charges;

2.5. regional breakdown of amounts under point 2.1. by regions defined as
Objective 1 regions and other areas;

3. Other information and remarks.
Notice from the Commission on a simplified procedure for treatment of certain types of State Aid

(Text with EEA relevance)

(2009/C 136/03)

1. INTRODUCTION

1. This Notice sets out a simplified procedure under which the Commission intends, in close cooperation with the Member State concerned, to examine within an accelerated time frame certain types of State support measures which only require the Commission to verify that the measure is in accordance with existing rules and practices without exercising any discretionary powers. The Commission’s experience gained in applying Article 87 of the Treaty establishing the European Community and the regulations, frameworks, guidelines and notices adopted on the basis of Article 87 (1), has shown that certain categories of notified aid are normally approved without raising any doubts as to their compatibility with the common market, provided that there are no special circumstances. These categories of aid are described in Section 2. Other aid measures notified to the Commission will be subject to the appropriate procedures (2) and normally to the Code of Best Practice for the conduct of State aid control procedures (3).

2. The purpose of this Notice is to set out the conditions under which the Commission will usually adopt a short-form decision declaring certain types of State support measures compatible with the common market under the simplified procedure and to provide guidance in respect of the procedure itself. When all the conditions set out in this Notice are met, the Commission will use its best endeavours to adopt a short-form decision that the notified measure does not constitute aid or not to raise objections within 20 working days from the date of notification, in accordance with Article 4(2) or Article 4(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (4).

3. However, if any of the safeguards or exclusions set out in points 6 to 12 of this Notice are applicable, the Commission will revert to the normal procedure regarding notified aid described in Chapter II of Regulation (EC) No 659/1999 and will then adopt a full-form decision pursuant to Article 4 and/or Article 7 of that Regulation. In any case, the only legally enforceable time limits are those set out in Article 4(5) and Article 7(6) of Regulation (EC) No 659/1999.

4. By following the procedure outlined in this Notice, the Commission aims to make Community State Aid control more predictable and efficient, pursuant to the general principles set out in the State Aid Action Plan: Less and Better Targeted State Aid: A Roadmap for State Aid Reform 2005-2009 (5).


(2) Measures notified to the Commission in the context of the current financial crisis pursuant to the Communications from the Commission entitled ‘The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis’ (OJ C 270, 25.10.2008, p. 8) and the ‘Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis’ (OJ C 16, 22.1.2009, p. 1) and State aid measures implementing the European Recovery Plan (Communication from the Commission to the European Council, A European Economic Recovery Plan, COM(2008) 800 final of 26 November 2008) will not be subject to the simplified procedure set out in this Notice. Specific ad hoc arrangements have been put in place in order to deal swiftly with those cases.

(3) See page 13 of this Official Journal.


This Notice thereby also contributes to the simplification strategy launched by the Commission in October 2005 (1). No part of this Notice should be interpreted as implying that a support measure which does not qualify as State aid within the meaning of Article 87 of the Treaty must be notified to the Commission, although Member States remain free to notify such support measures for reasons of legal certainty.

2. CATEGORIES OF STATE AID SUITABLE FOR TREATMENT UNDER THE SIMPLIFIED PROCEDURE

Eligible categories of State aid

5. The following categories of measures are in principle suitable for treatment under the simplified procedure:

(a) Category 1: Aid measures falling within the 'standard assessment' sections of existing frameworks or guidelines

Aid measures falling within the 'standard assessment' (so-called 'safe harbour' sections (2), or equivalent types of assessment (3) in horizontal guidelines and frameworks, which are not covered by the General block exemption Regulation, are in principle suitable for treatment under the simplified procedure.

The simplified procedure will only be applied in cases where the Commission is satisfied, after the pre-notification phase (see points 13 to 16), that all the substantive and procedural requirements laid down in the applicable sections of the respective instruments are fulfilled. This implies that the pre-notification phase confirms that the notified aid measure prima facie meets the relevant conditions, as further detailed in each of the applicable horizontal instruments, concerning:

— type of beneficiaries,
— eligible costs,
— aid intensities and bonuses,
— individual notification ceiling or maximum aid amount,
— type of aid instrument used,
— cumulation,
— incentive effect,
— transparency,
— exclusion of beneficiaries which are subject to an outstanding recovery order (4).

(2) Such as Section 5 of the Framework for Research and Development and Innovation or Section 3 of the Environmental Aid Guidelines, and Section 4 of the Risk Capital Guidelines.
(3) Regional Aid Guidelines; Section 3.1.2 of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 244, 1.10.2004, p. 2, hereinafter the 'Rescue and Restructuring Guidelines'.
(4) The Commission will revert to the normal procedure where the notified aid measure could benefit an undertaking which is subject to an outstanding recovery order following a previous Commission decision declaring an aid unlawful and incompatible with the common market (so-called Deggendorf issue). See Case C-188/92 TWD Textilwerke Deggendorf [1994] ECR I-833.
The types of measures for which the Commission is prepared to consider applying the simplified procedure within this category include in particular the following:

(i) risk capital measures taking a form other than a participation into a private equity investment fund and meeting all other conditions of Section 4 of the Risk Capital Guidelines (1);

(ii) environmental investment aid meeting the conditions of Section 3 of the Environmental Aid Guidelines:

— the eligible cost basis of which is determined on the basis of a full cost calculation methodology in line with point 82 of the Environmental Aid Guidelines (2), or

— including an eco-innovation bonus demonstrated to be in line with point 78 of the Environmental Aid Guidelines (3);

(iii) aid for young innovative enterprises granted in accordance with Section 5.4 of the Framework for Research and Development and Innovation and the innovative character of which is determined on the basis of Section 5.4(b)(i) of the Framework (4);

(iv) aid for innovation clusters granted in accordance with Sections 5.8 and 7.1 of the Framework for Research and Development and Innovation;

(v) aid for process and organisational innovation in services granted in accordance with Section 5.5 of the Framework for Research and Development and Innovation;

(vi) ad hoc regional aid which is below the individual notification threshold laid down in point 64 of the Regional Aid Guidelines (5);

(vii) rescue aid in the manufacturing and services sectors (except in the financial sector) meeting all substantive conditions of Sections 3.1.1 and 3.1.2 of the Rescue and Restructuring Guidelines (6);

(viii) rescue and restructuring schemes for small enterprises meeting all conditions of Section 4 of the Rescue and Restructuring Guidelines (7);

(ix) ad hoc restructuring aid for small and medium enterprises, provided it meets all the conditions laid down in Section 3 of the Rescue and Restructuring Guidelines (8);

(1) Including cases where the financial institutions of the European Union act as holding fund to the extent the risk capital measure at stake falls under Section 4 of the Risk Capital Guidelines.

(2) Article 18(5) of the General block exemption Regulation foresees a simplified cost calculation methodology.

(3) The General block exemption Regulation does not exempt eco-innovation bonuses.

(4) Only aid to young innovative enterprises meeting the conditions laid down in point 5.4(b)(ii) of the Framework for Research and Development and Innovation are subject to the General block exemption Regulation.

(5) In such cases, the information to be provided by the Member State will need to demonstrate upfront that: (i) the aid amount remains below the notification threshold (without sophisticated net present value calculations); (ii) the aid concerns a new investment (no replacement investment); and (iii) the beneficial effects of the aid on regional development manifestly outweigh the distortions of competition it creates. See for example the Commission’s Decision in case N 721/2007 (Poland, ‘Reuters Europe SA’).

(6) See for example the Commission’s Decision in cases N 28/2006 (Poland, Techmatrans), N 258/2007 (Germany, Retungshilfe zugunsten der Erich Rohde KG) and N 802/2006 (Italy, rescue aid to Sandretto Industrie).

(7) See for example the Commission’s Decisions in cases N 85/2008 (Austria, Guarantee scheme for small and medium-sized enterprises in the region of Salzburg), N 386/2007 (France, Rescue and restructuring scheme for small and medium-sized enterprises), N 832/2006 (Italy, Rescue and restructuring scheme Valle d’Aosta). This approach is in line with Article 1(7) of the General block exemption Regulation.

(8) See for example the Commission’s Decisions in cases N 92/2008 (Austria, Restructuring aid for Der Bäcker Legat) and N 289/2007 (Italy, Restructuring aid to Fiem SRL).
(x) export credits in the shipbuilding sector meeting all the conditions of Section 3.3.4 of the Shipbuilding Framework (1);

(xi) audiovisual support schemes meeting all the conditions set out in Section 2.3 of the Cinema Communication as regards the development, production, distribution and promotion of audiovisual works (2).

The above list is illustrative and may evolve on the basis of future revisions of the currently applicable instruments or the adoption of new instruments. The Commission may review this list from time to time to keep it in line with applicable State aid rules.

(b) Category 2: Measures corresponding to well-established Commission decision-making practice

Aid measures with features corresponding to those of aid measures approved in at least three earlier Commission decisions (hereinafter 'precedent decisions'), the assessment of which can thus be immediately carried out on the basis of this established Commission decision-making practice, are in principle suitable for treatment under the simplified procedure. Only Commission decisions adopted within the last ten years preceding the date of pre-notification (see point 14) may qualify as 'precedent decisions'.

The simplified procedure will only be applied in cases where the Commission is satisfied, after the pre-notification phase (see points 13-16), that the relevant substantive and procedural conditions which governed the precedent decisions are met, in particular as regards the objectives and overall set-up of the measure, the types of beneficiaries, eligible costs, individual notification ceilings, aid intensities and (where applicable) bonuses, cumulation provisions, incentive effect, and transparency requirements. In addition, as pointed out in point 11, the Commission will revert to the normal procedure where the notified aid measure could benefit an undertaking which is subject to an outstanding recovery order following a previous Commission decision declaring an aid unlawful and incompatible with the common market (so-called Deggendorf issue).

The types of measures for which the Commission is prepared to consider applying the simplified procedure within this category include in particular the following:

(i) aid measures for the preservation of national cultural heritage related to activities linked to historic, ancient sites or national monuments, provided that the aid is limited to 'heritage conservation' within the meaning of Article 87(3)(d) of the Treaty (3);

(ii) aid schemes for theatre, dance and music activities (4);

(1) See for example the Commission’s Decisions in cases N 76/2008 (Germany, Prolongation of CIRR financing scheme for the export of ships), N 26/2008 (Denmark, Changes to financing scheme for the export of ships) and N 760/2006 (Spain, Extension of export financing scheme — Spanish shipbuilding).

(2) Although the Communication’s criteria apply directly only to the activity of production, in practice, they are also applied by analogy to assess the compatibility of the activities of pre- and post-production of audiovisual works, as well as the principles of necessity and proportionality under Articles 87(3)(d) and 151 of the Treaty. See for example the Commission’s Decisions in cases N 233/2008 (Latvian film support scheme), N 72/2008 (Spain, Scheme for the promotion of films in Madrid), N 60/2008 (Italy, Film support in the Sardinia region) and N 291/2007 (Netherlands Film Fund).

(3) See for example the Commission’s Decisions in cases N 393/2007 (Netherlands, Subsidy to NV Bergkwartier), N 106/2005 (Poland, Hala Ludowa in Wroclaw) and N 123/2005 (Hungary, Earmarked scheme for tourism and culture in Hungary).

(4) See for example the Commission’s Decisions in cases N 340/2007 (Spain, Aid for theatre, dance, music and audiovisual activities in the Basque country), N 257/2007 (Spain, Promotion of theatre production in the Basque country) and N 818/99 (France; Parafiscal tax on spectacles and concerts).
(iii) aid schemes for the promotion of minority languages (1);

(iv) aid measures in favour of the publishing industry (2);

(v) aid measures in favour of broadband connectivity in rural areas (3);

(vi) guarantee schemes for shipbuilding finance (4);

(vii) aid measures fulfilling all other applicable provisions of the General block exemption Regulation, but excluded from its application merely because:

— the measures constitute ‘ad hoc aid’ (5),

— the measures are provided in an untransparent form (Article 5 of the General block exemption Regulation), but their gross grant equivalent is calculated on the basis of a methodology approved by the Commission in three individual decisions adopted after 1 January 2007;

(viii) measures supporting the development of local infrastructure not constituting State aid within the meaning of Article 87(1) of the Treaty in view of the fact that, having regard to the specificities of the case, the measure in question will not have any effect on intra-Community trade (6);

(ix) the prolongation and/or modification of existing schemes outside the scope of the simplified procedure foreseen in Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (7) (see category 3 below), for example as regards the adaptation of existing schemes to new horizontal guidelines (8).

(1) See for example the Commission's Decisions in cases N 776/2006 (Spain, Aid for the promotion of the Basque Language), N 49/2007 (Spain, Aid for the promotion of the Basque Language) and N 161/2008 (Spain, Aid to the Basque Language).

(2) See for example the Commission's Decisions in cases N 687/2006 (Slovak Republic, Aid to Kalligram s.r.o. in favour of a periodical), N 1/2006 (Slovenia, Promotion of the publishing industry in Slovenia) and N 268/2002 (Italy, Aid in favour of the publishing industry in Sicily).

(3) See for example the Commission's Decisions in cases N 264/2006 (Italy, Broadband for rural Tuscany), N 473/2007 (Italy, Broadband connections for Alto Adige) and N 115/2008 (Broadband in rural areas of Germany).

(4) See for example the Commission's Decisions in cases N 325/2006 (Germany, prolongation of the guarantee schemes for shipbuilding finance), N 35/2006 (France, Guarantee scheme for ship financing and bonding) and N 253/2005 (Netherlands, Guarantee scheme for ship financing).

(5) Ad hoc aid is often excluded from the scope of the General block exemption Regulation. This exclusion applies to all large enterprises (Article 1(6) of the General block exemption Regulation), as well as, in certain instances, to small and medium-sized enterprises (see Articles 13 and 14 concerning regional aid, Article 16 concerning female entrepreneurship, Article 29 concerning aid in the form of risk capital and Article 40 concerning aid for the recruitment of disadvantaged workers). As regards the specific conditions governing ad hoc regional investment aid, see footnote 14 above. Moreover this Notice is without prejudice to any Commission communication or guidance paper laying down detailed economic assessment criteria for the compatibility analysis of cases subject to individual notification.

(6) See the Commission's Decisions in cases N 258/2000 (Germany, leisure pool Dorsten), N 486/2002 (Sweden, Aid in favour of a congress hall in Visby), N 610/2001 (Germany, Tourism infrastructure program Baden-Württemberg), N 377/2007 (The Netherlands, Support to Bataviawerf — Reconstruction of a vessel from the 17th century). In order for the measure concerned to be considered as not having any effect on intra-Community trade, these four precedent decisions require: most prominently, a demonstration by the Member State of the following features: 1. that the aid does not lead to investments being attracted in the region concerned; and 2. that the goods/services produced by the beneficiary are purely local and/or have a geographically limited attraction zone; and 3. that there is no more than marginal effect on consumers from neighbouring Member States; and 4. that the market share of the beneficiary is minimal on any relevant market definition used and that the beneficiary does not belong to a wider group of undertakings. These features should be highlighted in the draft notification form referred to in point 14 of this Notice.


(8) See for example the Commission's Decisions in cases N 585/2007 (United Kingdom, Prolongation of Yorkshire R&D scheme), N 275/2007 (Germany, Prolongation of rescue and restructuring scheme for small and medium-sized enterprises in Bremen), N 496/2007 (Italy (Lombardia) Guarantee Fund for the development of risk capital) and N 625/2007 (Latvia, Aid to risk capital to small and medium-sized enterprises).
This list is illustrative, since the exact scope of this category may evolve in line with Commission decision-making practice. The Commission may review this illustrative list from time to time to keep it in line with evolving practice.

(c) Category 3: Prolongation or extension of existing schemes

Article 4 of Regulation (EC) No 794/2004 foresees a simplified notification procedure for certain alterations to existing aid. Under that Article, the ‘[…] following alterations to existing aid shall be notified on the simplified notification form set out in Annex II:

(a) increases in the budget of an authorised aid scheme exceeding 20 %;

(b) prolongation of an existing authorised aid scheme by up to six years, with or without an increase in the budget;

(c) tightening of the criteria for the application of an authorised aid scheme, a reduction of aid intensity or a reduction of eligible expenses'.

The possibility of applying Article 4 of Regulation (EC) No 794/2004 remains unaffected by this Notice. However, the Commission invites the notifying Member State to proceed in accordance with this Notice, including pre-notification of the aid measures concerned, while using the simplified notification form annexed to Regulation (EC) No 794/2004. The Commission will, in the context of this procedure, also invite the Member State concerned to agree on the publication on the Commission’s website of the summary of its notification.

Safeguards and exclusions

6. Since the simplified procedure applies only to aid notified on the basis of Article 88(3) of the Treaty, unlawful aids are excluded. Moreover, due to the specificities of the sectors concerned the simplified procedure will not apply to aid favouring activities in the fishery and aquaculture sectors, activities in the primary production of agricultural products or activities in the processing or marketing of agricultural products. In addition, the simplified procedure will not be applied retroactively to measures pre-notified before 1 September 2009.

7. In assessing whether a notified aid measure falls into one of the eligible categories set out in point 5, the Commission will ensure that the applicable frameworks or guidelines and/or established Commission decision-making practice on the basis of which the notified aid measure is to be assessed, as well as all relevant factual circumstances, are established with sufficient clarity. Given that the completeness of the notification constitutes a key element for determining whether the simplified procedure is to be applied, the notifying Member State is invited to provide all relevant information, including the precedent decisions relied upon, if appropriate, at the outset of the pre-notification phase (see point 14).

8. Where the notification form is not complete or contains misleading or incorrect information, the Commission will not apply the simplified procedure. In addition, to the extent that the notification involves novel legal issues of a general interest, the Commission will not normally apply the simplified procedure.

9. While it can normally be assumed that aid measures falling into the categories set out in point 5 will not raise doubts as to their compatibility with the common market, there may nonetheless be special circumstances which require a closer investigation. In such cases, the Commission may revert to the normal procedure at any time.
10. Such special circumstances may include in particular: certain forms of aid as yet untested in the Commission's decision-making practice, precedent decisions which the Commission may be in the course of reassessing in the light of recent case-law or developments of the common market, novel technical issues, or concerns as regards the measure's compatibility with other provisions of the Treaty (for example, non-discrimination, the four freedoms, etc.).

11. The Commission will revert to the normal procedure where the notified aid measure could benefit an undertaking which is subject to an outstanding recovery order following a previous Commission decision declaring an aid unlawful and incompatible with the common market (so-called *Deggendorf* issue).

12. Finally, if a third party expresses substantiated concerns about the notified aid measure within the time-limit laid down in point 21 of this Notice, the Commission will revert to the normal procedure (1) and will inform the Member State to that effect.

### 3. PROCEDURAL PROVISIONS

#### Pre-notification contacts

13. The Commission has found pre-notification contacts with the notifying Member State beneficial even in seemingly unproblematic cases. Such contacts allow the Commission and the Member States, in particular, to determine at an early stage the relevant Commission instruments or precedent decisions, the degree of complexity which the Commission's assessment is likely to involve and the scope and depth of the information required for the Commission to make a full assessment of the case.

14. In view of the time constraints of the simplified procedure, the assessment of a State support measure under the simplified procedure is conditional upon the Member State holding pre-notification contacts with the Commission. In this context, the Member State is invited to submit a draft notification form with the necessary supplementary information sheets provided for in Article 2 of Regulation (EC) No 794/2004, and the relevant precedent decisions if appropriate, via the Commission's established IT application. The Member State may also request, at this stage, that the Commission waive the completion of certain parts of the notification form. The Member State and the Commission may also agree, in the context of the pre-notification contact, that the Member State does not need to provide a draft notification form and accompanying information in the pre-notification phase. Such an agreement may be appropriate, for instance, due to the repetitive nature of certain aid measures (for instance the category of aid set out in point 5(c) of this Notice). In this context, the Member State may be invited to proceed directly with the notification where detailed discussion about the envisaged aid measures is not considered necessary by the Commission.

15. Within two weeks from the receipt of the draft notification form, the Commission services will organise a first pre-notification contact. The Commission will promote the holding of contacts via email or conference calls or, at the specific request of the Member State concerned, organise meetings. Within 5 working days after the last pre-notification contact, the Commission services will inform the Member State concerned whether it considers that the case qualifies *prima facie* for treatment under the simplified procedure, which information still needs to be provided for the measure to qualify for treatment under that procedure, or whether the case will remain subject to the normal procedure.

16. The indication by the Commission services that the case concerned can be treated under the simplified procedure implies that the Member State and the Commission services agree *prima facie* that the information provided in the pre-notification context would, if submitted as a formal notification, constitute a complete notification. The Commission would thus, in principle, be in a position to approve the measure, once formally notified on the basis of a notification form embodying the result of the pre-notification contacts, without a further request for information.

Notification

17. The Member State must notify the aid measure(s) concerned no later than 2 months after it is informed by the Commission services that the measure qualifies *prima facie* for treatment under the simplified procedure. If the notification includes any changes as compared to the information presented in the pre-notification documents, such changes must be highlighted prominently in the context of the notification form.

18. The submission of the notification by the Member State concerned triggers the start of the period referred to in point 2.

19. The simplified procedure does not provide for a specific simplified notification form. Except as regards cases which fall within the category of aid set out in point 5(c) of this Notice, the notification is to be carried out on the basis of the standard notification forms in Regulation (EC) No 794/2004.

Publication of a summary of the notification

20. The Commission will publish on its website a summary of the notification, based on the information provided by the Member State, in the standard form set out in the Annex to this Notice. The standard form contains an indication that, on the basis of the information provided by the Member State, the aid measure may qualify for the application of a simplified procedure. By requesting the Commission to treat a notified measure under this Notice, the Member State concerned will be considered to agree that the information provided in its notification, which is to be published on the website in the form set out in the Annex to this Notice, is non-confidential in nature. Furthermore, Member States are invited to clearly indicate whether the notification contains any business secrets.

21. Interested parties will then have 10 working days to submit observations (including a non-confidential version), in particular on circumstances which might require a more thorough investigation. In cases where substantiated competition concerns are raised by interested parties with respect to the notified measure, the Commission will revert to the normal procedure and inform the Member State and the interested party or parties concerned to that effect. The Member State concerned will also be informed of any substantiated concerns and will be given the opportunity to comment on them.

Short-form decision

22. If the Commission is satisfied that the notified measure fulfils the criteria for the simplified procedure (see, in particular, point 5), it will issue a short-form decision. The Commission will thus use its best endeavours to adopt a decision that the notified measure does not constitute aid or a decision not to raise objections pursuant to Article 4(2) or (3) of Regulation (EC) No 659/1999 within 20 working days from the date of notification, unless any safeguard or exclusion referred to in points 6 to 12 of this Notice is applicable.

Publication of the short-form decision

23. In accordance with Article 26(1) of Regulation (EC) No 659/1999 the Commission will publish a summary notice of the decision in the *Official Journal of the European Union*. The short-form decision will be made available on the Commission’s website. It will contain a reference to the summary information about the notification as published on the Commission’s website at the time of notification, a standard assessment of the measure under Article 87(1) of the Treaty and, where applicable, a statement that the aid measure is declared compatible with the common market because it falls within one or more of the categories set out in point 5 of this Notice, with the applicable category or categories being explicitly identified and a reference to the applicable horizontal instruments and/or precedent decisions included.
4. FINAL PROVISIONS

24. Upon request of the Member State concerned, the Commission will apply the principles set out in this Notice to measures notified pursuant to point 17 as from 1 September 2009.

25. The Commission may review this Notice on the basis of important competition policy considerations or in order to take account of the evolution of State aid law and decision-making practice. The Commission intends to carry out a first review of this Notice at the latest four years after its publication. In this context, the Commission will examine the extent to which specific simplified notification forms should be developed in order to facilitate the implementation of this Notice.
ANNEX

Summary of Notification: Invitation to third parties to submit comments

Notification of a State Aid measure

On ... the Commission received a notification of an aid measure pursuant to Article 88 of the Treaty establishing the European Community. On preliminary examination, the Commission finds that the notified measure could fall within the scope of the Commission Notice on a simplified procedure for treatment of certain types of State aid (OJ C ... 16.6.2009, p. ...).

The Commission invites interested third parties to submit their possible observations on the proposed measure to the Commission.

The main features of the aid measure are the following:

Reference number of the aid: N ...
Member State:
Member State reference number:
Region:
Granting authority:
Title of the aid measure:
National legal basis:
Proposed Community basis for assessment: ... guidelines or established Commission practice as highlighted in Commission Decision (1, 2 and 3).
Type of measure: Aid scheme/Ad hoc aid
Amendment of an existing aid measure:
Duration (scheme):
Date of granting:
Economic sector(s) concerned:
Type of beneficiary (SMEs/large enterprises):
Budget:
Aid instrument (grant, interest rate subsidy, ...):

Observations raising competition issues relating to the notified measure must reach the Commission no later than 10 working days following the date of this publication and include a non-confidential version of these observations to be provided to the Member State concerned and/or other interested parties. Observations can be sent to the Commission by fax, by post or email under reference number N ... to the following address:

European Commission
Directorate-General for Competition
State Aid Registry
1049 Bruxelles/Brussels
BELGIQUE/BELGIË
Fax +32 22961242
Email: stateaidgreffe@ec.europa.eu
Code of Best Practice for the conduct of State aid control procedures
(2009/C 136/04)

1. SCOPE AND PURPOSE OF THIS CODE

1. In 2005, the Commission adopted the State Aid Action Plan: Less and better targeted State aid: a roadmap for State aid reform 2005-2009 (the SAAP) (1) to improve the effectiveness, transparency, credibility and predictability of the State aid regime under the Treaty establishing the European Community. Based on the principle of less and better targeted State aid, the central objective of the SAAP is to encourage Member States to reduce their overall aid levels, whilst redirecting State resources to horizontal common interest objectives. To support this objective, the SAAP also calls for more effective, simple and predictable procedures in the State aid field.

2. The Commission wishes to reaffirm that commitment by issuing this Code of Best Practice to make procedures as productive and efficient as possible for all parties concerned. This Code is built on the experience acquired in the application of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (2) and on internal Commission studies on the duration of the different steps of the State aid procedure, the treatment of complaints and information gathering tools. The principal aim of this Code is to provide guidance on the day-to-day conduct of State aid procedures, thereby fostering a spirit of better co-operation and mutual understanding between the Commission services, Member State authorities and the legal and business community.

3. A successful improvement of State aid procedures requires discipline on both sides and a mutual commitment from the Commission and the Member States. While the Commission cannot be held responsible for the consequences of a lack of cooperation from Member States and interested parties, it will work to improve the conduct of its investigations and its internal decision-making process, in order to ensure greater transparency, predictability and efficiency of State aid procedures.

4. In line with modern State aids architecture, this Code is the final part of a simplification package comprising the Notice from the Commission on a simplified procedure for treatment of certain types of State aid (3) and the Commission Notice on the enforcement of State aid law by national courts (4) which contributes to more predictable and transparent procedures.

5. The specific features of an individual case may however require an adaptation of, or deviation from, this Code (5).

6. The specificities of the fishery and aquaculture sectors and of the activities in the primary production, marketing or processing of agricultural products may also justify a deviation from this Code.

2. RELATIONSHIP TO COMMUNITY LAW

7. This Code is not intended to provide a full or comprehensive account of the relevant legislative, interpretative and administrative measures which govern Community State aid control. It should be read in conjunction with and as a supplement to the basic rules governing State aid procedures.

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(3) See page 3 of this Official Journal.
(5) In the context of the 2008 banking crisis, the Commission has taken appropriate steps to ensure the swift adoption of decisions upon complete notification, if necessary within 24 hours and over a weekend. See Communication from the Commission — The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (OJ C 270, 25.10.2008, p. 8). As regards the real economy, see Communication from the Commission — Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 83, 7.4.2009, p. 1).

9. This Code sets out day-to-day Best Practices to contribute to speedier, more transparent and more predictable State aid procedures at each step of the investigation of a notified or non-notified case or a complaint.

3. PRE-NOTIFICATION CONTACTS

10. The Commission's experience demonstrates the added value of pre-notification contacts, even in seemingly standard cases. Pre-notification contacts provide the Commission services and the notifying Member State with the possibility to discuss the legal and economic aspects of a proposed project informally and in confidence prior to notification, and thereby enhance the quality and completeness of notifications. In this context, the Member State and the Commission services can also jointly develop constructive proposals for amending problematic aspects of a planned measure. This phase thus paves the way for a more speedy treatment of notifications, once formally submitted to the Commission. Successful pre-notifications should effectively allow the Commission to adopt decisions pursuant to Article 4(2), (3) and (4) of Regulation (EC) No 659/1999 within two months from the date of notification (2).

11. Pre-notification contacts are strongly recommended for cases where there are particular novelties or specific features which would justify informal prior discussions with the Commission services but informal guidance will be provided whenever a Member State calls for it.

3.1. Content

12. The pre-notification phase offers the possibility to discuss and provide guidance to the Member State concerned about the scope of the information to be submitted in the notification form to ensure it is complete as from the date of notification. A fruitful pre-notification phase will also allow discussions, in an open and constructive atmosphere, of any substantive issues raised by a planned measure. This is particularly important as regards projects which could not be accepted as such and should thus be withdrawn or significantly amended. It can also comprise an analysis of the availability of other legal bases or the identification of relevant precedents. In addition, a successful pre-notification phase will allow the Commission services and the Member State to address key competition concerns, economic analysis and, where appropriate, external expertise required to demonstrate the compatibility of a planned project with the common market. The notifying Member State may thus also request the Commission services, in pre-notification, to waive the obligation to provide certain information foreseen in the notification form which in the specific circumstances of the case is not necessary for its examination. Finally, the pre-notification phase is decisive to determine whether a case qualifies prima facie for treatment under the simplified procedure (3).

3.2. Scope and timing

13. In order to allow for a constructive and efficient pre-notification phase, it is in the interest of the Member State concerned to provide the Commission with the information necessary for the assessment of a planned State aid project, on the basis of a draft notification form. In order to facilitate swift treatment of the case, contacts by emails or conference calls will in principle be favoured rather than meetings. Within two weeks from the receipt of the draft notification form, the Commission services will normally organise a first pre-notification contact.

(2) This time limit cannot be respected where the Commission's services have to issue several requests for information due to incomplete notifications.
(3) See Notice from the Commission on a simplified procedure for treatment of certain types of State aid.
14. As a general rule, pre-notification contacts should not last longer than 2 months and should be followed by a complete notification. Should pre-notification contacts not bring the desired results, the Commission services may declare the pre-notification phase closed. However, since the timing and format of pre-notification contacts depend on the complexity of the individual case, pre-notification contacts may last several months. The Commission therefore recommends that, in cases which are particularly complex (for example, rescue aid, large research and development aid, large individual aid or particularly large or complex aid schemes), Member States launch pre-notification contacts as early as possible to allow for meaningful discussions.

15. In the Commission’s experience, involving the aid beneficiary in the pre-notification contacts is very useful, particularly for cases with major technical, financial and project-related implications. The Commission therefore recommends that beneficiaries of individual aid be involved in the pre-notification contacts.

16. Except in particularly novel or complex cases, the Commission services will endeavour to provide the Member State concerned with an informal preliminary assessment of the project at the end of the pre-notification phase. That non-binding assessment will not be an official position of the Commission, but informal guidance from the Commission services on the completeness of the draft notification and the prima facie compatibility of the planned project with the common market. In particularly complex cases, the Commission services may also provide written guidance, at the Member State’s request, on the information still to be provided.

17. Pre-notification contacts are held in strict confidence. The discussions take place on a voluntary basis and remain without prejudice to the handling and investigation of the case following formal notification.

18. In order to enhance the quality of notifications, the Commission services will endeavour to meet requests for training sessions by Member States. The Commission will also maintain regular contacts with Member States to discuss further improvements of the State aid procedure, in particular as regards the scope and content of the applicable notification forms.

4. MUTUALLY AGREED PLANNING

19. In cases which are particularly novel, technically complex or otherwise sensitive, or which have to be examined as a matter of absolute urgency, the Commission services will offer mutually agreed planning to the notifying Member State to increase the transparency and predictability of the likely duration of a State aid investigation.

4.1. Content

20. Mutually agreed planning is a form of structured cooperation between the Member State and the Commission services, based on a joint planning and understanding of the likely course of the investigation and its expected time frame.

21. In this context, the Commission services and the notifying Member State could in particular agree on:

— the priority treatment of the case concerned, in return for the Member State formally accepting the suspension of the examination (1) of other notified cases originating from the same Member State, should this be necessary for planning or resource purposes (2).

(2) For instance, in cases where the financial institutions of the European Union act as holding fund.
— the information to be provided by the Member State and/or the beneficiary concerned, including studies or external expertise, or unilateral information-gathering by the Commission services, and

— the likely form and duration of the assessment of the case by the Commission services, once notified.

22. In return for the Member State's efforts in providing all the necessary information in a timely manner and as agreed in the context of mutually agreed planning, the Commission services will endeavour to respect the mutually agreed time frame for the further investigation of the case, unless the information provided by the Member State or interested parties raises unexpected issues.

4.2. Scope and timing

23. Mutually agreed planning will in principle be reserved for cases which are so novel, technically complex or otherwise sensitive that a clear preliminary assessment of the case by the Commission services proves impossible at the end of the pre-notification phase. In such cases, mutually agreed planning will take place at the end of the pre-notification phase, and be followed by the formal notification.

24. However, the Commission services and the Member State concerned may also agree, at the latter's request, on mutually agreed planning for the further treatment of the case at the outset of the formal investigation procedure.

5. THE PRELIMINARY EXAMINATION OF NOTIFIED MEASURES

5.1. Requests for information

25. In order to streamline the course of the investigation, the Commission services will endeavour to group requests for information during the preliminary examination phase. In principle, there will therefore only be one comprehensive information request, normally to be sent within 4-6 weeks after the date of notification. Unless otherwise agreed in mutually agreed planning, pre-notification should enable Member States to submit a complete notification thereby reducing the need for additional information. However, the Commission may subsequently raise questions most notably on points that have been raised by the Member States' answers, although this does not necessarily indicate that the Commission is experiencing serious difficulties in assessing the case.

26. Should the Member State fail to provide the requested information within the prescribed period, Article 5(3) of Regulation (EC) No 659/1999 will, after one reminder, normally be applied, and the Member State will be informed that the notification is deemed to have been withdrawn. The formal investigation procedure will normally be initiated whenever the necessary conditions are met, and generally after two rounds of questions at most.

5.2. Agreed suspension of the preliminary examination

27. In certain circumstances, the course of the preliminary examination may be suspended if a Member State so requests to amend its project and bring it in line with State aid rules, or otherwise by common agreement. Suspension may only be granted for a period agreed in advance. Should the Member State fail to submit a complete, prima facie compatible project at the end of the suspension period, the Commission will resume the procedure from the point at which it was halted. The Member State concerned will normally be informed that the notification is deemed to have been withdrawn, or the formal investigation procedure opened without delay in case of serious doubts.
5.3. **State of play contacts**

28. At their request, notifying Member States will be informed of the state of play of an ongoing preliminary examination. Member States are invited to involve the beneficiary of an individual aid in these contacts.

6. **THE FORMAL INVESTIGATION PROCEDURE**

29. In the light of the general complexity of cases subject to formal investigation, the Commission is committed to improving the transparency, predictability and efficiency of this phase as a matter of utmost priority, to contribute to meaningful decision-making in line with the needs of modern business. The Commission will therefore streamline the conduct of formal investigations through efficient use of all the procedural means available to it under Regulation (EC) No 659/1999.

6.1. **Publication of the decision and meaningful summary**

30. Where the Member State concerned does not request the removal of confidential information, the Commission will endeavour to publish its decision to open the formal investigation procedure, including the meaningful summaries, within two months from the date of adoption of that decision.

31. Where there is disagreement concerning confidentiality issues, the Commission will apply the principles of its Communication of 1 December 2003 on professional secrecy in State aid decisions (1) and use its best endeavours to proceed with publication of the decision within the shortest possible time frame following its adoption. The same will apply to the publication of all final decisions.

32. To improve the transparency of the procedure, the Member State, the beneficiary and other stakeholders (in particular potential complainants) will be informed of all delays triggered by disagreements concerning confidentiality issues.

6.2. **Comments from interested parties**

33. According to Article 6 of Regulation (EC) No 659/1999, interested parties must submit comments within a prescribed period which must normally not exceed one month following the publication of the decision to initiate the formal investigation procedure. That time limit will not normally be extended, and the Commission services will thus usually not accept any belated submission of information from interested parties, including the beneficiary of the aid (2). Extensions may be granted only in exceptional duly justified cases, such as the provision of particularly voluminous factual information or following contact between the Commission services and the interested party concerned.

34. In order to improve the factual basis of the investigation of particularly complex cases, the Commission services may send a copy of the decision to initiate the formal investigation procedure to identified interested parties including trade or business associations, and invite them to comment on specific aspects of the case (3). Interested parties’ cooperation in this context is purely voluntary, but if an interested party chooses to provide comments, it is in its interest to submit those comments in a timely manner so that the Commission will be able to take them into account. Therefore, the Commission will invite interested parties to react within one month from the date on which the copy of the decision is sent to them. The Commission will not wait any further for those comments to be submitted. In order to ensure equal treatment between interested parties the Commission will send the same invitation to comment to the aid beneficiary. In order to respect the Member State’s right of defence, it will forward to the Member State a non-confidential version of any comments received from interested parties and invite the Member State to reply within one month.

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(2) Without prejudice to Article 10(1) of Regulation (EC) No 659/1999.
(3) According to settled case-law, the Commission is entitled to send the decision to open the formal investigation to identified third parties; see for example, Case T-198/01 Technische Glaswerke Ilmenau v. Commission (2004) ECR II-2717, paragraph 195; T-198/01R Technische Glaswerke Ilmenau v. Commission (2002) ECR II-2153; Joined Cases C-74/00 P and C-75/00 P Falk & Spur and others v. Commission (2002) ECR I-7869, paragraph 83.
35. In order to ensure transmission of all comments from interested parties to the Member State concerned in the most expedient manner, Member States will, as far as possible, be invited to accept transmission of those comments in their original language. If a Member State so requests, the Commission services will provide a translation, which may have implications as regards the expediency of procedures.

36. Member States will also be informed of the absence of any comments from interested parties.

6.3. Member States’ comments

37. To ensure timely completion of the formal investigation procedure, the Commission will rigorously enforce all time limits applicable to this phase under Regulation (EC) No 659/1999. If a Member State fails to submit its comments on the Commission’s decision to initiate the formal investigation procedure and on interested parties’ comments within the one-month time limit set in Article 6(1) of Regulation (EC) No 659/1999, the Commission services will immediately send a reminder granting the Member State concerned an additional period of one month and informing the Member State that no further extension will be granted, save in exceptional circumstances. In the absence of a meaningful reply by the Member State concerned, the Commission will take a decision on the basis of the information available to it, in accordance with Article 7(7) and Article 13(1) of Regulation (EC) No 659/1999.

38. In the case of unlawful aid, and in the absence of comments from the Member State on the decision to initiate the formal investigation procedure, the Commission will, pursuant to Article 10 of Regulation (EC) No 659/1999, issue an information injunction. Should the Member State fail to reply to that injunction within the time limit set therein, the Commission will take a decision on the basis of the information available to it.

6.4. Request for additional information

39. It cannot be excluded that, in particularly complex cases, the information submitted by the Member State in response to the decision to initiate the formal investigation procedure may require the Commission services to send a further request for information. A time limit of one month will be set for the Member State to reply.

40. Should the Member State not reply within the time limit, the Commission services will immediately send a reminder setting a final deadline of 15 working days and informing the Member State concerned that the Commission will thereafter take a decision on the basis of the information available to it, or issue an information injunction in the case of unlawful aid.

6.5. Justified suspension of the formal investigation

41. Only in exceptional circumstances and by common agreement between the Commission services and the Member State concerned may the formal investigation be suspended. Suspension could, for example, occur if the Member State formally requests a suspension in order to bring its project in line with State aid rules, or if there is pending litigation before the Community courts regarding similar issues, the outcome of which is likely to have an impact on the assessment of the case.

42. Suspension will normally only be granted once, and for a period agreed in advance between the Commission services and the Member State concerned.
6.6. Adoption of the final decision and justified extension of the formal investigation

43. In accordance with Article 7(6) of Regulation (EC) No 659/1999, the Commission will as far as possible endeavour to adopt a decision within a period of 18 months from the opening of the procedure. That time limit may be extended by common agreement between the Commission and the Member State concerned. An extension of the duration of the investigation may in particular be appropriate in cases concerning novel projects or raising novel legal issues.

44. In order to ensure effective implementation of Article 7(6) of Regulation (EC) No 659/1999, the Commission will endeavour to adopt the final decision no later than 4 months after the submission of the last information by the Member State, or the expiry of the last time limit without information having been received.

7. COMPLAINTS

45. The efficient and transparent handling by the Commission services of complaints brought before them is of considerable importance to all stakeholders in State aid procedures. The Commission therefore proposes the following Best Practices, designed to contribute to that joint objective.

7.1. The complaint form

46. The Commission services will systematically invite complainants to use the new complaints form available on DG’s Competition website (http://ec.europa.eu/comm/competition/forms/sa_complaint_en.html) and, at the same time, to submit a non-confidential version of the complaint. The submission of complete forms will normally allow complainants to enhance the quality of their submissions.

7.2. Indicative time frame and outcome of the investigation of a complaint

47. The Commission will use its best endeavours to investigate a complaint within an indicative time frame of twelve months from its receipt. That time limit does not constitute a binding commitment. Depending on the circumstances of the individual case, the possible need to request complementary information from the complainant, the Member State or interested parties may extend the investigation of a complaint.

48. The Commission is entitled to give different degrees of priority to the complaints brought before it (1), depending for instance on the scope of the alleged infringement, the size of the beneficiary, the economic sector concerned or the existence of similar complaints. In the light of its workload and its right to set the priorities for investigations (2), it can thus postpone dealing with a measure which is not a priority. Within twelve months, the Commission will, therefore, in principle, endeavour to:

(a) adopt a decision for priority cases pursuant to Article 4 of Regulation (EC) No 659/1999, with a copy addressed to the complainant;

(b) send an initial administrative letter to the complainant setting out its preliminary views on non-priority cases. The administrative letter is not an official position of the Commission, but only a preliminary view of the Commission services, based on the information available and pending any additional comments the complainant might wish to make within one month from the date of the letter. If further comments are not provided within the prescribed period, the complaint will be deemed to be withdrawn.

49. As a matter of transparency, the Commission services will use their best endeavours to inform the complainant of the priority status of its submission, within two months from the date of receipt of the complaint. In the case of unsubstantiated complaints, the Commission services will inform the complainant within two months from receipt of the complaint that there are insufficient grounds for taking a view on the case, and that the complaint will be deemed to be withdrawn if further substantive comments are not provided within one month. As regards complaints which refer to approved aid, the Commission services will also endeavour to reply to the complainant within 2 months from receipt of the complaint.

50. In the case of unlawful aid, complainants will be reminded of the possibility to initiate proceedings before national courts, which can order the suspension or recovery of such aid (1).

51. When necessary, the non-confidential version of a complaint will be transmitted to the Member State concerned for comments. Member States and the complainants will systematically be kept informed of the closure or other processing of a complaint. In return, Member States will be invited to respect the time limits for commenting and providing information on complaints transmitted to them. They will also be invited to accept, as far as possible, transmission of complaints in their original language. If a Member State so requests, the Commission services will provide a translation, which may have implications as regards the expediency of procedures.

8. INTERNAL DECISION MAKING PROCEDURES

52. The Commission is committed to streamlining and further improving its internal decision-making process, in order to contribute to an overall shortening of State aid procedures.

53. To this effect, internal decision-making procedures will be applied as efficiently as possible. The Commission will also review its current internal legal framework to optimise its decision-making procedures.

54. The Commission services will keep their internal decision-making practice under constant review and adapt it if necessary.

9. FUTURE REVIEW

55. Procedural Best Practices can only be effective if they are based on a shared commitment by the Commission and Member States to diligently pursue State aid investigations, respect applicable time limits and thereby ensure the necessary transparency and predictability of procedures. This Code and the Best Practices enshrined therein are a first contribution to this joint commitment.

56. The Commission will apply this Code to measures which have been notified to the Commission or otherwise brought to the Commission’s attention as from 1 September 2009.

57. This Code may be revised to reflect changes to legislative, interpretative and administrative measures or the case-law of the European Courts, which govern State Aid procedure or any experience gained in its application. The Commission further intends to engage, on a regular basis, in a dialogue with the Member States and other stakeholders on the experience gained in the application of Regulation (EC) No 659/1999 in general, and this Code of Best Practice in particular.

(1) See Commission Notice on the enforcement of State aid law by national courts.
NOTICE FROM THE COMMISSION
Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid

(2007/C 272/05)

1. INTRODUCTION

1. In 2005, the Commission presented its road map for State aid reform in its State Aid Action Plan (1). The programme of reform will improve the effectiveness, transparency and credibility of the EU State aid regime. At the heart of the Action Plan is the principle of 'less and better targeted State aid'. The central objective is to encourage Member States to reduce their overall aid levels, whilst redirecting State aid resources at objectives having a clear Community interest. To achieve this, the Commission is committed to continue taking a strict approach towards the most distorting types of aid, in particular towards unlawful and incompatible aid.

2. In recent years, the Commission has demonstrated that it is prepared to take a strong stance against unlawful aid. Ever since the entry into force of the Council Regulation (EC) No 659/1999 (2) ('the Procedural Regulation'), it has systematically ordered Member States to recover any unlawful aid found to be incompatible with the common market, unless it considered that this would be contrary to a principle of Community law. Since 2000, it has adopted 110 such recovery decisions.

3. It is essential for the integrity of the State aid regime that these Commission decisions ordering Member States to recover unlawful State aid (hereafter 'recovery decisions') are enforced in an effective and immediate manner. The information collected by the Commission in recent years shows that there is cause for real concern in this respect. Experience shows that there is practically not a single case in which recovery was completed within the deadline set out in the recovery decision. Recent editions of the State aid Scoreboard also show that 45% of all recovery decisions adopted in 2000-2001 had still not been implemented by June 2006.

4. In 2004, the Commission ordered a comparative study on the enforcement of EU State aid policy in different Member States (3) (hereinafter referred to as the 'Enforcement Study'). One of the objectives of the study was to assess the effectiveness of recovery procedures and practices in a number of Member States. The authors of the Study found that the 'excessive length of recovery proceedings is a recurring theme in all country reports'. They recognised that the implementation of recovery decisions had somewhat improved in recent years, but concluded that the recovery of unlawful and incompatible aid still faces a number of obstacles in most of the Member States surveyed.

5. In its State aid Action Plan, the Commission stresses the need for an effective enforcement of recovery decisions. It is clear that the implementation of such decisions is a shared responsibility between the Commission and the Member States and will require considerable efforts by both in order to be successful.

6. The purpose of the present communication is to explain the Commission's policy towards the implementation of recovery decisions. It shall not examine the consequences that national courts may draw from the non respect of the notification and standstill obligation of Article 88(3) EC. The Commission considers there is a need to clarify the measures it intends to take to facilitate the execution of recovery decisions and to set out actions Member States could take to ensure that they reach full compliance.

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(3) Study on the enforcement of State aid law at national level, Competition studies 6, Luxembourg, Office for Official Publications of the European Communities: http://ec.europa.eu/comm/competition/state_aid/overview/studies.html
with the rules and principles as established by the body of European law and, in particular, the case law of the Community Courts. To this end, the notice will first recall the purpose of recovery and the basic principles underlying the implementation of recovery decisions. It will then present the practical implications of these basic principles for each of the actors involved in the recovery process.

2. THE PRINCIPLES OF RECOVERY POLICY

2.1. A short history of recovery policy

7. Article 88(3) EC states that ‘the Commission shall be informed in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. [...] The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.’

8. In cases where Member States do not notify the Commission of its plans to grant or alter aid prior to such aid being put into effect, the aid is unlawful in relation to Community law from the time that it is granted.

9. In its ‘Kohlegesetz’ judgment (4) of 1973, the European Court of Justice (ECJ) confirmed for the first time that the Commission had the power to order the recovery of unlawful and incompatible State aid. The Court held that the Commission was competent to decide that a Member State must alter or abolish a State aid that was incompatible with the common market. It should therefore also be entitled to require repayment of this aid. On the basis of this judgment and subsequent case law (5), the Commission informed the Member States in a Communication published in 1983 that it had decided to use all measures at its disposal to ensure that Member States’ obligations under Article 88(3) EC are fulfilled, including the requirement, that Member States recover incompatible aid granted unlawfully from the recipient (6).

10. In the second half of the 1980s and in the 1990s, the Commission started to order the recovery of unlawful and incompatible aid more systematically. In 1999, basic rules on recovery were included in the Procedural Regulation. Further implementing provisions on recovery were included in Commission Regulation (EC) No 794/2004 (7) (the Implementing Regulation).

11. Article 14(1) of the Procedural Regulation confirms the constant case law of the Community Courts (8) and establishes an obligation on the Commission to order recovery of unlawful and incompatible aid unless this would be contrary to a general principle of law. This Article also provides that the Member State concerned shall take all necessary measures to recover unlawful aid that is found to be incompatible. Article 14(2) establishes that the aid is to be recovered, including interest from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its effective recovery. The Implementing Regulation elaborates the methods to be used for the calculation of recovery interest. Finally, Article 14(3) of the Procedural Regulation states, that ‘recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow for the immediate and effective execution of the Commission decision’.

12. In a number of recent judgments, the ECJ further clarified the scope and interpretation of Article 14(3) of the Procedural Regulation, thereby emphasising the need for an immediate and effective execution of recovery decisions (9). In addition, the Commission has also started to apply Deggendorf case law (10) in

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(6) OJ C 318, 24.11.1983, p. 3.
(10) Case C-188/92, TWD Textilwerke Deggendorf GmbH v Germany, (Deggendorf) ECR [1994], I-00833.
a more systematic manner. This case law enables the Commission, if certain conditions have been satisfied, to order Member States to suspend the payment of a new compatible aid to a company until that company has reimbursed old unlawful and incompatible aid that is subject to a recovery decision.

2.2. Purpose and principles of recovery policy

2.2.1. Purpose of recovery

13. The ECJ has held on several occasions that the purpose of recovery is to re-establish the situation that existed on the market prior to the granting of the aid. This is necessary to ensure that the level-playing field in the internal market is maintained, in accordance with Article 3(g) of the EC Treaty. In this context, the ECJ underlined that the recovery of unlawful and incompatible aid is not a penalty (11), but the logical consequence of the finding that it is unlawful (12). It can therefore not be regarded as disproportionate to the objectives of the Treaty with regards to State Aid (13).

14. According to the ECJ, the 're-establishment of the previously existing situation is obtained once the unlawful and incompatible aid is repaid by the recipient who thereby forfeits the advantage which he enjoyed over his competitors in the market, and the situation as it existed prior to the granting of the aid is restored' (14). In order to eliminate any financial advantages incidental to unlawful aid, interest is to be recovered on the sums unlawfully granted. Such interest must be equivalent to the financial advantage arising from the availability of the funds in question, free of charge, over a given period (15).

15. Furthermore, the ECJ has insisted that in order for a Commission recovery decision to be fully executed, the actions undertaken by a Member State must produce concrete effects as regards recovery (16) and that recovery must be immediate (17). For recovery to reach its objective, it is indeed essential that the repayment of the aid takes place without delay.

2.2.2. The obligation to recover unlawful and incompatible State aid and its exceptions

16. Article 14(1) of the Procedural Regulation specifies that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'.

17. The Procedural Regulation imposes two limits on the Commission's power to order recovery of unlawful and incompatible aid. Article 14(1) of the Procedural Regulation provides that the Commission shall not require recovery of the aid if this would be contrary to a general principle of law. The general principles of law most often invoked in this context are the principles of the protection of legitimate expectation (18) and of legal certainty (19). It is important to note that the ECJ has given a very restrictive interpretation to these principles in the context of recovery. Article 15 of the Procedural Regulation states that the powers of the Commission to recover aid shall be subject to a limitation period of 10 years (the so-called 'prescription period'). The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Commission (20) or by a Member State, acting at the request of the Commission, with regard to the unlawful aid, shall interrupt the limitation period.

(16) Case C-415/03, Commission v Greece, cited above footnote 9.
(18) On the principle of the protection of the legitimate expectations, please see please see Case C-24/95, Alcan, [1997] ECR I-1391, paragraph 25, Case C-3(89), Bä-G-Aulichen, [1990] ECR I-3437, paragraphs 11 and 14. For an example where the ECJ recognised the existence of legitimate expectations on the side of the beneficiary, please see Case C-223/85, RSV, [1987] ECR 4617.
18. Under Article 249 of the EC Treaty, decisions are binding in their entirety upon those to whom they are addressed. Therefore, the Member State to which a recovery decision is addressed is obliged to execute this decision (21). The ECJ has recognised only one exception to this obligation for a Member State to implement a recovery decision addressed to it, namely the existence of exceptional circumstances that would make it absolutely impossible for the Member State to execute the decision properly (22).

19. According to the Community Courts, absolute impossibility can however not be merely supposed. The Member State must demonstrate that it attempted, in good faith, to recover unlawful aid and it must cooperate with the Commission in accordance with Article 10 of the EC Treaty, with a view to overcoming the difficulties encountered (23).

20. A review of the jurisprudence shows that the Community Courts have interpreted the concept of ‘absolute impossibility’ in a very restrictive manner. The Courts have confirmed on several occasions that a Member State may not plead requirements of its national law, such as national prescription rules (24) or the absence of a recovery title under national law (25), in order to justify its failure to comply with a recovery decision (26). In the same way, the ECJ held that the obligation to recover is not affected by circumstances linked to the economic situation of the beneficiary. It clarified that a company in financial difficulties does not constitute proof that recovery was impossible (27). In such circumstances, the court pointed out that the absence of any recoverable assets is the only way for a Member State to show the absolute impossibility of recovering the aid (28). In a number of cases, the Member State argued that they had not been able to execute the recovery decision, because of the administrative or technical difficulties involved (e.g. the very high number of beneficiaries involved). The Court consistently refused to accept that such difficulties constitute an absolute impossibility to recover (29). Finally, the apprehension of even insurmountable internal difficulties cannot justify a failure by a Member State to fulfil its obligations under Community law (30).

2.2.3. The use of national procedures and the necessity of an immediate and effective execution

21. Article 14(3) of the Procedural Regulation specifies that ‘recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission’s decision.’

22. If Member States are free to choose, according to their national law, the means by which they implement recovery decisions, the measures chosen should give full effect to the recovery decision. It is therefore necessary that the national measures taken by Member States lead to an effective and immediate execution of the Commission decision.

23. In its Olympic Airways judgment (31), the ECJ underlined that the implementation measures taken by the Member State must be effective and produce a concrete outcome in terms of recovery. The actions undertaken by the Member State must result in the actual recovery of the sums owed by the beneficiary. In its recent Scott judgment (32), the ECJ confirmed that line and emphasised that national procedures which do not fulfil the conditions laid down in Article 14(3) of the Procedural Regulation should be left unapplied. It refuted, in particular, the Member State’s argument that it had taken all steps available in its national system and insisted that these steps should also lead to a concrete outcome in terms of recovery, and this within the deadline set by the Commission.

(22) Case C-404/00, Commission v Spain, [2003] ECR I-6695.
(27) Case C-52/84, Commission v Belgium, cited above footnote 26, paragraph 14.
(29) Case C-280/95, Commission v Italy, cited above footnote 23.
(30) Case C-6/97, Italy v Commission, [1999] ECR I-2981, paragraph 34.
(31) Case C-415/03, Commission v Greece, cited above footnote 9.
24. Article 14(3) of the Procedural Regulation requires that recovery decisions are implemented in a way that is both effective and immediate. In the Scott case, the ECJ stressed the importance of the time-dimension in the recovery process. The Court specified that the application of national procedures should not impede the restoration of effective competition by preventing the immediate and effective execution of the Commission’s decision. National procedures, which prevent the immediate restoration of the previously existing situation and prolong the unfair competitive advantage resulting from unlawful and incompatible aid, do not fulfil the conditions laid down in Article 14(3) of the Procedural Regulation.

25. In this context it is important to recall that an action for annulment of a recovery decision brought under Article 230 of the EC Treaty does not have a suspensive effect. In the context of such an action, the beneficiary of the aid may however apply for the suspension of the execution of the recovery decision pursuant of Article 242 of the EC Treaty. Applications for suspension, must state the circumstances giving rise to urgency and must contain the pleas of fact and law establishing a prima facie case for the interim measures being applied for. The ECJ or the CFI may then, if they consider that circumstances so require, order that application of the contested Commission decision be suspended.

2.2.4. The principle of loyal cooperation

26. Article 10 of the Treaty oblige Member States to facilitate the achievement of the Community tasks and imposes mutual duties of cooperation on the EU institutions and Member States, with a view to attaining the objectives of the Treaty.

27. In the context of the implementation of recovery decisions, the Commission and the Member States’ authorities must therefore cooperate to attain the objective of the restoration of competitive conditions in the internal market.

28. If a Member State encounters unforeseen or unforeseeable difficulties in executing the recovery decision within the required time-limit or perceives consequences overlooked by the Commission, it should submit those problems for consideration to the Commission, together with proposals for suitable amendments. In such a case, the Commission and the Member State concerned must work together in good faith to overcome the difficulties whilst fully observing the EC Treaty provisions. Likewise the principle of loyal cooperation requires that the Member States provide the Commission with all the information enabling it to establish that the means chosen constitutes an adapted implementation of the decision.

29. Informing the Commission of the technical and legal difficulties involved in implementing a recovery decision does however not relieve Member States from the duty to take all necessary steps possible to recover the aid from the undertaking in question and to propose to the Commission any suitable arrangements for implementing the decision.

3. IMPLEMENTING RECOVERY POLICY

30. Both the Commission and the Member States have an essential role to play in the implementation of recovery decisions and may contribute to a effective enforcement of recovery policy.

3.1. The role of the Commission

31. The Commission’s recovery decision imposes a recovery obligation upon the Member State concerned. It requires the Member State concerned to recover a certain amount of aid from a beneficiary or a number of beneficiaries within a given time frame. Experience shows that the speed with which a recovery decision is executed is affected by the degree of precision or the completeness of that decision. The Commission will therefore continue its efforts to ensure that recovery decisions provide a clear indication of the amount(s) of aid to be recovered, the undertaking(s) liable to recovery and the deadline within which the recovery should be completed.

(33) Case C-404/00, Commission v Spain, cited above footnote 22.
(34) Case C-94/87, Commission v Germany, [1989] ECR 175, paragraph 9, Case C-348/93, Commission v Italy, cited above footnote 14, paragraph 17.
(35) For an illustration of proposals for implementation see Case C-209/00, Commission v Germany, [2002] ECR I-11695.
(36) Case 94/87, Commission v Germany cited above footnote 34, paragraph 10.
Identification of the undertakings from whom the aid must be recovered

32. The unlawful and incompatible aid must be recovered from the undertakings that actually benefited from it (37). The Commission will continue its present practice of identifying in its recovery decisions, where possible, the identity of the undertaking(s) from whom the aid must be recovered. If, at the stage of the implementation, it appears that the aid was transferred to other entities, the Member State may have to extend recovery to encompass all effective beneficiaries to ensure that the recovery obligation is not circumvented.

33. The Community Courts have given some guidance on the conditions under which the recovery obligation must be extended to companies other than the original beneficiary of the unlawful and incompatible aid. According to the ECJ, a transfer of the undue advantage may occur when the assets of the original aid beneficiary are transferred to a third party at a price that is lower than their market value sometimes to a successor company set up in order to circumvent the recovery order. If the Commission can prove that assets have been sold at a price that is lower than their market value, especially to a successor company set up to circumvent the recovery order, the ECJ considers that the recovery order can be extended to that third party (38). Typical cases of circumvention are cases where the transfer does not reflect any economic logic other than the invalidation of the recovery order (39).

34. As regards transfer of shares of a company that has to reimburse an illegal and incompatible aid (share deals), the ECJ held (40) that the sale of shares in such a company to a third party does not affect the obligation of the beneficiary to reimburse such aid (41). When it can be established that the buyer of the shares paid the prevailing market price for the shares of that company, it cannot be regarded as having benefited from an advantage that could constitute a State Aid (42).

35. When it adopts a recovery decision regarding aid schemes, the Commission is normally not in a position to identify, in the decision itself, all the undertakings that have received unlawful and incompatible aid. This will have to be done at the start of the implementation process by the Member State concerned, who will have to look at the individual situation of each undertaking concerned (43).

Determination of the amount to be recovered

36. The purpose of recovery is achieved ‘once the aid in question, together where appropriate with default interest, has been repaid by the recipient or, in other words, by the undertakings which actually benefited from it. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored’ (44).

37. As it has done in the past, the Commission will clearly identify the unlawful and incompatible aid measures that are subject to recovery in its recovery decisions. When it has the necessary data at its disposal, the Commission will also endeavour to quantify the precise amount of aid to be recovered. It is clear, though, that the Commission cannot and is legally not required to fix the exact amount to be recovered. It is sufficient for the Commission’s decision to include information enabling the Member State to determine the amount, without too much difficulty (45).

(38) Case C-277/00, Germany v Commission, cited above footnote 37.
(39) Case C-328/99 and C-399/00, Italy and SMI 2 Multimedia Spa v Commission, [2003] I-4035, paragraph 83.
(40) Case C-328/99 and C-399/00, Italy and SMI 2 Multimedia v Commission, [2003] I-4035, paragraph 83.
(41) In the event of a privatisation of a company that received State aid declared compatible by the Commission, the Member State can introduce a liability clause in the privatisation agreement to protect the buyer of the company against the risk that the initial Commission decision approving the aid would be overturned by the Community Courts and replaced by a Commission decision ordering the recovery of that aid from the beneficiary. Such a clause could provide for an adjustment of the price paid by the buyer for the privatised company to take due account of the new recovery liability.
(42) Case C-277/00, Germany v Commission, cited above footnote 37, paragraph 80.
(44) Case C-277/00, Germany v Commission, cited above footnote 37, paragraphs 74-76.
38. In the case of an unlawful and incompatible aid scheme, the Commission is not able to quantify the amount of incompatible aid to be recovered from each beneficiary. This would require a detailed analysis by the Member State of the aid granted in each individual case on the basis of the scheme in question. The Commission therefore indicates in its decision that Member States will have to recover all aid, unless it has been granted to a specific project, which, at the time of granting, fulfilled all conditions of the block exemption regulations or in an aid scheme approved by the Commission.

39. According to Article 14(2) of the Procedural Regulation, the aid to be recovered pursuant to a recovery decision shall include interest at an appropriate level to be fixed by the Commission. Interest shall be payable from the time the unlawful aid was at the disposal of the beneficiary until the date of its recovery (46). The Implementing Regulation establishes that the interest rate shall be applied on a compound basis until the date of the recovery of the aid.

Timetable for the implementation of the decision

40. In the past, the Commission's recovery decisions specified a single time-limit of two months, within which the Member State concerned was required to communicate to the Commission, the measures it had taken to comply with a given decision. The Court acknowledged that this deadline is to be regarded as the deadline for the execution of the Commission decision itself (47).

41. The Court further concluded that contacts and negotiations between the Commission and the Member State, in the context of the execution of the Commission decision, could not relieve the Member State from the duty to take all necessary measures to execute the decision within the prescribed time-limit (48).

42. The Commission recognizes that the two months deadline for the execution of the Commission decisions is too short in the majority of cases. Therefore, it decided to prolong to four months the deadline for the execution of the recovery decisions. From now on, the Commission will specify two time limits in its decisions:

— a first time-limit of two months following the entry into force of the decision, within which the Member State must inform the Commission of the measures planned or taken,

— a second time-limit of four months following the entry into force of the decision, within which the Commission decision must have been executed.

43. If a Member State encounters serious difficulties preventing it from respecting either one of these deadlines, it must inform the Commission of these difficulties, providing an appropriate justification. The Commission may then prolong the deadline in accordance with the principle of loyal cooperation (49).

3.2. The role of the Member States: implementing the recovery decisions

3.2.1. Who is responsible for the implementation of the recovery decision?

44. The Member State is responsible for the implementation of the recovery decision. Article 14(1) of the Procedural Regulation provides that the Member State concerned is to take all necessary measures to recover the aid from the beneficiary.

45. In this context, it is important to keep in mind that the ECJ has recalled on several occasions that a Commission decision addressed to a Member State is binding on all the organs of that State, including the Courts of that State (50). This implies that each organ of the Member State involved in the implementation of a recovery decision must take all necessary measures to secure the immediate and effective application of such a decision.

(46) See in that context, the exception of Case C-480/98, Spain v Commission, cited above footnote 45, paragraphs 36 and following.
(49) Case C-207/05, Commission v Italy, [2006], judgement of 1 June 2006.
46. Community law does not prescribe which organ of the Member State should be in charge of the practical implementation of a recovery decision. It is for the domestic legal system of each Member State to designate the bodies that will be responsible for the implementation of the recovery decision. The authors of the Enforcement Study note that ‘a principle common to all countries reviewed is that recovery must be effected by the authority that granted the aid. This leads to the involvement of a variety of central, regional and local bodies, in the recovery process’(51). They also point out that some Member States have charged one central body with the task to control and oversee the recovery process. This body normally has ongoing contact with the Commission. The authors of the Enforcement Study conclude that the existence of such a central body appears to contribute to a more efficient implementation of recovery decisions.

3.2.2. Implementation of the recovery obligation

47. Article 14(3) of the Procedural Regulation obliges the Member State to initiate recovery proceedings without any delay. As mentioned in section 3.1 above, the recovery decision will specify a time-limit within which the Member State is to submit precise information on the measures it has taken and planned to execute the decision. In particular, the Member State will be required to provide complete information on the identity of the beneficiaries of the unlawful and incompatible aid, the amounts of aid involved and the national procedure applied to obtain recovery. In addition, the Member State will be required to provide documentation showing that it notified the beneficiary of its obligation to repay the aid.

Identification of the aid beneficiary and the amount to be recovered

48. The recovery decision will not always contain complete information on the identity of the beneficiaries, nor on the amounts of aid to be recovered. In such cases, the Member State must identify without any delay the undertakings concerned by the decision and quantify the precise amount of aid to be recovered from each of them.

49. In the case of an unlawful and incompatible aid scheme, the Member State will be required to carry out a detailed analysis of each individual aid granted on the basis of the scheme in question. To quantify the precise amount of aid to be recovered from each individual beneficiary under the scheme, it will need to determine the extent to which the aid has been granted to a specific project, which, at the time of granting, fulfilled all conditions of the block exemption regulations or in an aid scheme approved by the Commission. In such cases, the Member State may also apply the substantive De Minimis criteria applicable at the time of the granting of the unlawful and incompatible aid that is subject to the recovery decision.

50. National authorities are allowed to take into account the incidence of the tax system in order to determine the amount to be reimbursed. Where a beneficiary of unlawful and incompatible aid has paid tax on the aid received, the national authorities may, in accordance with their national tax rules, take account of the earlier payment of tax by recovering only the net amount received by the beneficiary (52). The Commission considers that in such cases, the national authorities will need to ensure that the beneficiary will not be able to enjoy a further tax deduction by claiming that the reimbursement has reduced his taxable income, since this would mean that the net amount of the recovery was lower than the net amount initially received.

The applicable recovery procedure

51. The authors of the Enforcement Study provide ample evidence of the fact that recovery procedures vary significantly between Member States. The Study also shows that, even within one single Member State, several procedures can be applied to pursue the recovery of unlawful and incompatible aid. In most Member States, the applicable recovery procedure is normally determined by nature of the measure underlying the granting of the aid. Administrative procedures, on the whole, tend to be much more efficient than civil procedures, because administrative recovery orders are or can be made immediately enforceable (53).

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(51) See page 521 of the Study.
(53) See pages 522 and following of the Study.
52. Community law does not prescribe which procedure the Member State should apply to execute a recovery decision. However, Member States should be aware that the choice and application of a national procedure is subject to the condition that such procedure allows for the immediate and effective execution of the Commission’s decision. This implies that the authorities responsible should carefully consider the full range of recovery instruments available under national law and select the procedure most likely to secure the immediate execution of the decision (54). They should use fast-track procedures where possible under national law. According to the principle of equivalence and effectiveness, these procedures must not be less favourable than those governing similar domestic actions, and that they should not render practically impossible or excessively difficult the exercise of rights conferred by Community law (55).

53. More generally, Member States should not be able to place any obstacles in the way of carrying out a Commission recovery decision (56). Consequently, Member State authorities are under an obligation to set aside any provisions of national law, which might impede the immediate execution of the Commission decision (57).

The notification and enforcement of recovery orders

54. Once the beneficiary, the amount to be recovered and the applicable procedure have been determined, recovery orders should be sent to the beneficiaries of the unlawful and incompatible aid without delay and within the deadline prescribed by the Commission decision. The authorities responsible for carrying out the recovery must ensure that these recovery orders are enforced and that recovery is completed within the time-limit specified in the decision. Where a beneficiary does not comply with the recovery order, Member States should seek the immediate enforcement of its recovery claims under national law.

3.2.3 Litigation before national courts

55. The implementation of recovery decisions can give rise to litigation in national courts. Although there are very significant differences in the judicial traditions and systems of Member States, two main categories of recovery-related litigation can be distinguished: actions brought by the recovering authority seeking a court order to force an unwilling recipient to refund the unlawful and incompatible aid and actions brought by beneficiaries contesting the recovery order.

56. The analysis carried out in the context of the Enforcement Study provides evidence that the execution of a recovery decision can be delayed for many years when the national measures taken for the implementation of a recovery decision are challenged in court. This is even more the case when the recovery decision is itself challenged before Community courts and when national judges are asked to suspend the implementation of national measures until the Community Courts have ruled on the validity of the recovery decision.

57. The ECJ has ruled that the beneficiary of an aid who could without any doubt have challenged a Commission recovery decision under Article 230 EC before a European Court can no longer challenge the validity of the decision in proceedings before the national court on the ground that the decision was unlawful (58). It derives from this that the beneficiary of an aid who could have asked for interim relief before the Community Courts in accordance with Articles 242 and 243 EC and has failed to do so cannot ask for a suspension of the measures taken by the national authorities for implementing that decision on grounds linked to the validity of the decision. This question is reserved for the Community Courts (59).

(54) In this respect, the Study highlights the recent attempt by the German authorities to enforce the recovery claim in the Kvaerner Warnow Werft case where the aid was granted by a private law agreement. When the beneficiary refused to reimburse the aid, the competent authority decided not to bring action before the civil courts, but issued an administrative act ordering the immediate repayment of the aid. In addition, it declared the act immediately enforceable. The Higher Administrative Court of Berlin-Brandenburg held that the competent authority was not bound to recover the aid in the same manner in which it was granted and agreed that the ‘effet utile’ of the Commission’s decision required that the competent authority be allowed to recover the aid by way of an administrative act. If this judgment is confirmed in further proceedings, it can be expected that, in the future, recovery of aid in Germany will, in principle be carried out pursuant to administrative rules.


(58) Case C-188/92, TWD Textilwerke Degendorf GmbH v Germany, cited above footnote 10.

(59) As reaffirmed in the Case C-232/05, Commission v France, cited above footnote 9.
58. On the other hand, in cases where it is not self-evident that an action for annulment brought against the contested decision by the beneficiary of the aid would have been admissible, an adequate legal protection must be offered to the aid beneficiary. In the event that the aid beneficiary challenges the implementation of the decision in proceedings before the national court on the ground that such recovery decision was unlawful, the national judge must make a request for a preliminary ruling on the validity of such decision to the ECJ in accordance with Article 234 EC (60).

59. In case the beneficiary also asks for interim relief of the national measures adopted to implement the recovery decision because of an alleged illegality of the Commission's recovery decision, the national judge has to assess whether the case at hand fulfills the conditions established by the ECJ in the cases Zuckerfabrik (61) and Atlanta (62). According to settled case-law, interim relief can be ordered by the national court only if:

1. that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers the question to the Court of Justice;
2. there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief;
3. the court takes due account of the Community interest; and
4. in its assessment of all those conditions, it respects any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the Community act or on an application for interim measures seeking similar interim relief at Community level (63).

3.2.4. The specific case of insolvent beneficiaries

60. As a preliminary observation, it is important to recall that the ECJ has consistently held that the fact that a beneficiary is insolvent or subject to bankruptcy proceedings has no effect on its obligation to repay unlawful and incompatible aid (64).

61. In the majority of cases involving an insolvent aid beneficiary, it will not be possible to recover the full amount of unlawful and incompatible aid (including interests), as the beneficiary's assets will be insufficient to satisfy all creditors' claims. Consequently, it is not possible to fully re-establish the ex-ante situation in the traditional manner. Since the ultimate objective of recovery is to end the distortion of competition, the ECJ has stated that the liquidation of the beneficiary can be regarded as an acceptable option to recovery in such cases (65). The Commission is therefore of the view that a decision ordering the Member State to recover unlawful and incompatible aid from an insolvent beneficiary may be considered to be properly executed either when full recovery is completed or, in case of partial recovery, when the company is liquidated and its assets are sold under market conditions.

62. When implementing recovery decisions concerning insolvent beneficiaries, Member State authorities should ensure that due account is taken throughout the insolvency proceedings of the Community interest, and more in particular of the need to end immediately the distortion of competition caused by the granting of unlawful and incompatible aid.

[60] Case C-346/03, Atzeni a.o., [2006], page I-01875, paragraph 30-34.
[63] Case C-465/93, Atlanta Fruchthandelgesellschaft mbH a.o., cited above footnote 61, paragraph 51.
63. However, the Commission’s experience has shown that the sole registration of claims in bankruptcy proceedings may not always be sufficient to ensure the immediate and effective implementation of the Commission’s recovery decisions. The application of certain provisions of national bankruptcy laws may frustrate the effect of recovery decisions by allowing the company to operate despite the absence of full recovery, thus allowing the distortion of competition to continue. Based on its experience in dealing with cases of recovery from insolvent beneficiaries, the Commission considers that there is a need to define the obligations of Member States at the different steps of bankruptcy proceedings.

64. The Member State should immediately register its claims in the bankruptcy proceedings (66). According to the ECJ case law, recovery will be done according to national bankruptcy rules (67). The recovery debt will thus be refunded by virtue of the status given to it by national law.

65. In the past, there have been cases in which the insolvency administrator refused to register a recovery claim in the bankruptcy proceedings, and this because of the form of the illegal and incompatible aid granted (for example when the aid had been granted in the form of a capital injection). The Commission considers that this situation is problematic, especially if such a refusal would deprive the authorities responsible for the execution of the recovery decision of any means to ensure that due account is taken of the Community interest in the course of the insolvency proceedings. Therefore the Commission considers that the Member State should dispute the refusal by the insolvency administrator to register its claims (68).

66. To ensure the immediate and effective implementation of the Commission’s recovery decision, the Commission is of the view that the authorities responsible for the execution of the recovery decision should also appeal any decision by the insolvency administrator or the insolvency court to allow a continuation of the insolvent beneficiary’s activity beyond the time limits set in the recovery decision. Likewise, national courts, when faced with such a request, should take the Community interest fully into account, and more in particular the need to ensure that the execution of the Commission’s decision is immediate and that the distortion of competition caused by the unlawful and incompatible aid is ended as soon as possible. The Commission considers that they should therefore not allow for a continuation of an insolvent beneficiary’s activity in the absence of full recovery.

67. In the case where a continuation plan is proposed to the creditors’ committee implying a continuation of the activity of the beneficiary, the national authorities responsible for the execution of the recovery decision can only support this plan if it ensures that the aid is repaid in full within the time limits foreseen in the Commission’s recovery decision. In particular, the Member State cannot waive part of its recovery claim, nor can it accept any other solution that would not result in the immediate ending of the activity of the beneficiary. In the absence of a full and immediate repayment of the unlawful and incompatible aid, the authorities responsible for the execution of the recovery decision should take all measures available to oppose the adoption of a continuation plan and should insist on the ending of the activity of the beneficiary within the time limit set in the recovery decision.

68. In the case of liquidation, and as long as the aid has not been fully recovered, the Member State should oppose any transfer of assets that is not carried out on market terms and/or that is organised so as to circumvent the recovery decision. To achieve a ‘correct transfer of assets’, the Member State has to ensure that the undue advantage created by the aid is not transferred to the acquirer of the assets. This may be the case if the assets of the original aid beneficiary are transferred to a third party at a price that is lower than their market value or to a successor company set up in order to circumvent the recovery order. In such a case, the recovery order needs to be extended to that third party (69).

(67) Case C-142/87, ibid. Case C-499/99, Commission v Spain (Magefesa) [2002], ECR I-603, paragraphs 28-44.
(68) Please see in that context, the judgement of the Commercial Chamber of the Amberg Court of 23 July 2001 in relation to the aid granted by Germany to Neue Maxhütte Stahlwerke GmbH (Commission Decision 96/178/ECSC (OJ L 53, 2.3.1996, p. 41). In that case, the German court over-ruled the refusal of the insolvency administrator to register a recovery claim resulting from an illegal and incompatible aid granted in the form of a capital injection, as this would render the execution of the recovery decision impossible.
(69) Case C-277/00, Germany v Commission, cited above footnote 37.
4. CONSEQUENCES OF THE FAILURE TO IMPLEMENT THE COMMISSION RECOVERY DECISIONS

69. A Member State is deemed to comply with the recovery decision when the aid has been fully reimbursed within the prescribed time limit or, in the case of an insolvent beneficiary, when the company is liquidated under market conditions.

70. The Commission may also accept, in duly justified cases, a provisional implementation of the decision when it is subject to litigation before the national or the Community Courts (e.g. the payment of the full amount of unlawful and incompatible aid into a blocked account (70)). The Member State must ensure that the advantage linked to the unlawful and incompatible aid leaves the company (71). The Member State should submit, for approval by the Commission, a justification for the adoption of such provisional measures and a full description of the provisional measure envisaged.

71. Where the Member State concerned has not complied with the recovery decision, and where it has not been able to demonstrate the existence of absolute impossibility, the Commission may initiate infringement proceedings. In addition, if certain conditions are satisfied, it may require the Member State concerned to suspend the payment of a new compatible aid to the beneficiary or beneficiaries concerned in application of the Deggendorf principle.

4.1. Infringement proceedings

— Actions on the basis of Article 88(2) EC

72. If the Member State concerned does not comply with the recovery decision within the prescribed time limit and if it has not been able to demonstrate absolute impossibility, the Commission, as it has already done, or any other interested State, may refer the matter directly to the ECJ pursuant to with Article 88(2) of the Treaty. The Commission may then invoke arguments concerning the behaviour of the executive, legislative or judicial organs of the Member State concerned, as the Member State should be considered in its entirety (72).

— Actions on the basis of Article 228(2) EC

73. In the event that the ECJ condemns the Member State for non compliance with a Commission decision and if the Commission considers that the Member State concerned has not complied with the judgment of the ECJ, the Commission may pursue the matter in accordance with Article 228(2) of the Treaty. In such a case, after giving the Member State the opportunity to submit its observations, the Commission delivers a reasoned opinion specifying the points on which the Member State concerned was non-compliant with the judgment of the ECJ.

74. If the Member State concerned fails to take the necessary measures to comply with the ECJ’s judgment within the time limit laid down in the reasoned opinion, the Commission may further refer the matter to the ECJ, pursuant to Article 228(2) of the EC Treaty. The Commission will then request the ECJ to impose a penalty payment on the Member State concerned. This penalty payment will be fixed in accordance with the Commission communication on the application of Article 228 of the EC Treaty (73), and be calculated on the basis of three criteria: the seriousness of the infringement, its duration, and the need to ensure that the penalty itself is a deterrent to further infringements. According to the same communication, the Commission will also ask for the payment of a lump sum penalising the continuation of the infringement between the first judgement of non-compliance and the judgement delivered under Article 228 of the EC Treaty. In view of the fact that the failure to implement the Commission recovery decision prolongs the distortion of competition caused by the granting of illegal and incompatible aid, the Commission will not hesitate to make use of this possibility if it appears necessary to ensure the respect of the State aid rules.

(70) In practical terms, the payment of the total amount of aid and the interests on a blocked account may be ruled by a specific contract, signed by the bank and the beneficiary, and by which the parties agree that the sum will be released in favour of one or the other party once the litigation has come to an end.

(71) Contrary to the constitution of a blocked account, the use of bank guarantees may not be considered as an adequate provisional measure since the total amount of the aid is still at the recipient’s disposal.


4.2. Applying the Deggendorf case-law

75. In its judgment on the Deggendorf case, the CFI has held that, 'when the Commission considers the compatibility of a State aid with the common market, it must take all the relevant factors into account, including, where relevant, the circumstances already considered in a prior decision and the obligations which that previous decision may have imposed on a Member State. It follows that the Commission has the power to take into consideration, first, any accumulated effect of the old [...] aid and the new [...] aid and, secondly, the fact that the [old] aid declared unlawful [...] had not been repaid' (74). In application of this judgment, and to avoid a distortion of competition contrary to the common interest, the Commission may order a Member State to suspend the payment of a new compatible aid to an undertaking that has at its disposal an unlawful and incompatible aid subject to an earlier recovery decision, and this until the Member State has reassured itself that the undertaking concerned has reimbursed the old unlawful and incompatible aid.

76. The Commission has been applying the so-called Deggendorf principle in a more systematic manner for a few years now. In practice, in the course of the preliminary investigation of a new aid measure, the Commission will request a commitment from the Member State to suspend the payment of new aid to any beneficiary that still needs to reimburse an unlawful and incompatible aid subject to an earlier recovery decision. If the Member State does not give this commitment and/or in the absence of clear data on the aid measures involved (75) preventing the Commission to assess the global impact of the old and the new aid on competition, the Commission will take a final conditional decision on the basis of Article 7(4) of the Procedural Regulation, requiring the Member State concerned to suspend payment of the new aid until it is satisfied that the beneficiary concerned has reimbursed the old unlawful and incompatible aid, including any recovery interests due.

77. The Deggendorf principle has meanwhile been integrated in the Community Guidelines on State aid for rescuing and restructuring firms in difficulty (76) and in recent Block Exemption Regulations (77). The Commission intends to integrate this principle into all forthcoming State aid rules and decisions.

78. Finally, the Commission welcomes the initiative of Italy to insert a specific ‘Deggendorf’ provision in its ‘Legge Finanziaria 2007’, which provides that beneficiaries of new State aid measures should declare that they do not have at their disposal any illegal or incompatible State aid (78).

5. CONCLUSION

79. The maintenance of a system of free and undistorted competition is one of the cornerstones of the European Community. As part of the European competition policy, State aid discipline is essential to ensure that the internal market remains a level playing field in all economic sectors in Europe. In this key task, the Commission and the Member States have the joint responsibility to ensure a proper enforcement of State aid discipline and in particular of recovery decisions.

80. By issuing this communication, the Commission is willing to increase the awareness of the principles of recovery policy as defined by the Community Courts and to clarify the Commission practice as regards its recovery policy. The Commission commits itself to abide by these recalled principles and invites Member States to ask for advice when facing difficulties in implementing recovery decisions. The services of the Commission remain at the disposal of the Member States to provide further guidance and assistance if required.

(75) E.g. in the case of illegal and incompatible schemes where the amount and the beneficiaries are not known to the Commission.
(76) OJ C 244, 1.10.2004, p. 2, paragraph 23.
(78) Legge 27 dicembre 2006, n. 296, art. 1223.
81. In return, the Commission expects Member States to abide to the principles of recovery policy. It is only through a joint effort of both Commission and Member States that State aid discipline will be ensured and produce its desired objective, i.e. the maintenance of undistorted competition within the internal market.
Commission notice on the determination of the applicable rules for the assessment of unlawful State aid

(notified under document number C(2002) 458)

(2002/C 119/12)

(Text with EEA relevance)

A number of instruments approved by the Commission over the years contain a provision to the effect that unlawful State aid, i.e. aid put into effect in contravention of Article 88(3) of the EC Treaty, shall be assessed in accordance with the texts in force at the time when the aid was granted. This is for example the case for the Community guidelines on State aid for environmental protection (1) and the multisectoral framework on regional aid for large investment projects (2).

For the purpose of transparency and legal certainty, the Commission informs Member States and third parties that it has decided to apply the same rule in respect of all instruments indicating how the Commission will exercise its discretion in order to assess the compatibility of State aid with the common market (frameworks, guidelines, communications, notices). Therefore, the Commission shall always assess the compatibility of unlawful State aid with the common market in accordance with the substantive criteria set out in any instrument in force at the time when the aid was granted.

The present notice is without prejudice to the more specific rules contained in the Community guidelines on State aid for rescuing and restructuring firms in difficulty (3).

The present notice is without prejudice to the interpretation of Council and Commission regulations in the field of State aid.

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(1) OJ C 37, 3.2.2001, p. 3.
II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COMMISSION

Commission notice on the enforcement of State aid law by national courts
(2009/C 85/01)

1. INTRODUCTION

1. In 2005, the Commission adopted a road map for State aid reform, the State Aid Action Plan (1) (the SAAP), to improve the effectiveness, transparency, credibility and predictability of the State aid regime under the EC Treaty. Based on the principle of ‘less and better targeted State aid’, the central objective of the SAAP is to encourage Member States to reduce their overall aid, whilst redirecting State aid resources to horizontal common interest objectives. In this context, the Commission has reaffirmed its commitment to a strict approach towards unlawful and incompatible aid. The SAAP highlighted the need for better targeted enforcement and monitoring as regards State aid granted by Member States and stressed that private litigation before national courts could contribute to this aim by ensuring increased discipline in the field of State aid (2).

2. Prior to the adoption of the SAAP, the Commission had already addressed the role of national courts in the Notice on cooperation between national courts and the Commission in the State aid field, published in 1995 (3) (the 1995 Cooperation Notice). The 1995 Cooperation Notice introduced mechanisms for cooperation and exchange of information between the Commission and national courts.

3. In 2006, the Commission commissioned a study on the enforcement of State aid law at national level (4) (the Enforcement Study). This study was aimed at providing a detailed analysis of private State aid enforcement in different Member States. The Enforcement Study concluded that, in the period between 1999 and 2006, State aid litigation at Member State level had increased significantly (5).

4. However, the Enforcement Study also revealed that a large number of the legal proceedings at Member State level were not aimed at reducing the anticompetitive effect of the underlying State aid measures. This was because almost two thirds of the judgments analysed concerned actions brought by taxpayers who sought relief from the allegedly discriminatory imposition of a (tax) burden (6) and actions

(2) SAAP, paragraphs 55 and 56.
(4) Available at http://ec.europa.eu/comm/competition/state_aid/studies_reports/studies_reports.cfm The study only covered EU-15.
(5) A total increase from 116 cases to 357 cases.
(6) 51 % of all judgments.
brought by beneficiaries to challenge the recovery of unlawful and incompatible State aid (\(^7\)). The number of legal challenges aimed at enforcing compliance with the State aid rules was relatively small: actions by competitors against a Member State authority for damages, recovery and/or injunctive measures based on Article 88(3) of the Treaty accounted for only 19 % of the judgments analysed, whilst direct actions by competitors against beneficiaries accounted for only 6 % of the judgments.

5. In spite of the fact that, as highlighted in the Enforcement Study, genuine private enforcement before national courts has played a relatively limited role in State aid to date, the Commission considers that private enforcement actions can offer considerable benefits for State aid policy. Proceedings before national courts give third parties the opportunity to address and resolve many State aid related concerns directly at national level. In addition, based on the jurisprudence of the Court of Justice of the European Communities ('ECJ'), national courts can offer claimants very effective remedies in the event of a breach of the State aid rules. This can in turn contribute to stronger overall State aid discipline.

6. Accordingly, the main purpose of this Notice is to inform national courts and third parties about the remedies available in the event of a breach of State aid rules and to provide them with guidance as to the practical application of those rules. In addition, the Commission seeks to develop its cooperation with national courts by introducing more practical tools for supporting national judges in their daily work.

7. This Notice replaces the 1995 Cooperation Notice and is without prejudice to any interpretation of the applicable Treaty and regulatory provisions by the Community courts. Additional information aimed at national courts will be made available on the Commission’s website.

2. ROLE OF NATIONAL COURTS IN STATE AID ENFORCEMENT

2.1. General issues

2.1.1. Identifying State aid

8. The first issue facing national courts and potential claimants when applying Articles 87 and 88 of the Treaty is whether the measure concerned actually constitutes State aid within the meaning of the Treaty.

9. Article 87(1) of the Treaty covers ‘any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States’.

10. The ECJ has explicitly stated that, as is the case for the Commission, national courts have powers to interpret the notion of State aid (\(^8\)).

11. The notion of State aid is not limited to subsidies (\(^9\)). It also comprises, inter alia, tax concessions and investments from public funds made in circumstances where a private investor would have withheld

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\(^7\) 12 % of all judgments.


his support (\textsuperscript{15}). Whether the aid is granted directly by the State or by public or private bodies established or appointed by it to administer the aid is immaterial in this respect (\textsuperscript{11}). But, for public support to be considered State aid, the aid needs to favour certain undertakings or the production of certain goods (\textit{selectivity}), as opposed to general measures to which Article 87(1) of the Treaty does not apply (\textsuperscript{12}). In addition, the aid must distort or threaten to distort competition and must have an effect on trade between Member States (\textsuperscript{13}).

12. The case law of the Community courts (\textsuperscript{14}) and decisions taken by the Commission have frequently addressed the question of whether certain measures qualify as State aid. In addition, the Commission has issued detailed guidance on a series of complex issues, such as the application of the private investor principle (\textsuperscript{15}) and of the private creditor test (\textsuperscript{16}), the circumstances under which State guarantees must be regarded as State aid (\textsuperscript{17}), the treatment of public land sales (\textsuperscript{18}), privatisation and assimilated State actions (\textsuperscript{19}), aid below the \textit{de minimis} thresholds (\textsuperscript{20}), export credit insurance (\textsuperscript{21}), direct business taxation (\textsuperscript{22}), risk capital investments (\textsuperscript{23}), and State aid for research, development and innovation (\textsuperscript{24}). Case law, Commission guidance and decision making practice can provide valuable assistance to national courts and potential claimants concerning State aid.

13. Where doubts exist as to the qualification of State aid, national courts may ask for a Commission opinion under section 3 of this Notice. This is without prejudice to the possibility or the obligation

\(\textsuperscript{11}\) Cf. Advocate General Jacobs’ Opinion in Joined Cases C-278/92, C-279/92 and C-280/92, Spain v Commission, [1994] ECR I-4103, paragraph 28: “State aid is granted whenever a Member State makes available to an undertaking funds which in the normal course of events would not be provided by a private investor applying normal commercial criteria and disregarding other considerations of a social, political or philanthropic nature”.


\(\textsuperscript{13}\) A clear analysis of this distinction is to be found in Advocate General Darmon’s Opinion in Joined Cases C-72/91 and C-73/91, Sloman Neptun v Bodo Ziesemer, [1993] ECR I-887.


\(\textsuperscript{15}\) A good example is the Altmark ruling of the ECJ, Case C-280/00, Altmark Trans GmbH and Regentspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, [2003] ECR I-7747.


\(\textsuperscript{19}\) Commission Communication on State aid elements in sales of land and buildings by public authorities (OJ C 209, 10.7.1997, p. 3).


\(\textsuperscript{22}\) Communication of the Commission to the Member States pursuant to Article [93(1)] of the EC Treaty applying Articles [92] and [93] of the Treaty to short-term export-credit insurance (OJ C 281, 17.9.1997, p. 4), as last amended by the Communication of the Commission to Member States amending the communication pursuant to Article [93(1)] of the EC Treaty applying Articles [92] and [93] of the Treaty to short-term export-credit insurance (OJ C 325, 22.12.2005, p. 22).

\(\textsuperscript{23}\) Commission Notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).


for a national court to refer the matter to the ECJ for a preliminary ruling under Article 234 of the Treaty.

2.1.2. The standstill obligation

14. According to Article 88(3) of the Treaty, Member States may not implement State aid measures without the prior approval of the Commission (‘standstill obligation’):

The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision (25).

15. However, there are a number of circumstances in which State aid can be lawfully implemented without Commission approval:

(a) Where the measure is covered by a Block Exemption Regulation issued under the framework of Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid (26) (‘the Enabling Regulation’). Where a measure meets all the requirements of a Block Exemption Regulation, the Member State is relieved of its obligation to notify the planned aid measure and the standstill obligation does not apply. Based on the Enabling Regulation, the Commission originally adopted several Block Exemption Regulations (27), some of which have in the meantime been replaced by Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) (28).

(b) Similarly, existing aid (29) is not subject to the standstill obligation. This includes, amongst others, aid granted under a scheme which existed before a Member State’s accession to the European Union or under a scheme previously approved by the Commission (30).


(32) This does not apply where the scheme itself foresees an individual notification requirement for certain types of aid. On the notion of existing aid, see also Case C-44/93 Namur-Les assurances du crédit v Office national du ducroire and Belgian State [1994] ECR I-3829, paragraphs 28 to 34.
16. National court proceedings in State aid matters may sometimes concern the applicability of a Block Exemption Regulation or an existing or approved aid scheme, or both. Where the applicability of such a Regulation or scheme is at stake, the national court can only assess whether all the conditions of the Regulation or scheme are met. It cannot assess the compatibility of an aid measure where this is not the case, since that assessment is the exclusive responsibility of the Commission (31).

17. If the national court needs to determine whether the measure falls under an approved aid scheme, it can only verify whether all conditions of the approval decision are met. Where the issues raised at national level concern the validity of a Commission decision, the national court has no jurisdiction to declare acts of Community institutions invalid (32). Where the issue of validity arises, the national court may, or in some cases must, refer the matter to the ECJ for a preliminary ruling (33). Based on the principle of legal certainty as interpreted by the ECJ, even the possibility of questioning the validity of the underlying Commission decision by way of a preliminary ruling is no longer available where the claimant could undoubtedly have challenged the Commission decision before the Community courts under Article 230 of the Treaty, but failed to do so (34).

18. The national court may ask the Commission for an opinion under section 3 of the present Notice if it has doubts concerning the applicability of a Block Exemption Regulation or an existing or approved aid scheme.

2.1.3. Respective roles of the Commission and national courts

19. The ECJ has repeatedly confirmed that both national courts and the Commission play essential, but distinct roles in the context of State aid enforcement (35).

20. The Commission's main role is to examine the compatibility of proposed aid measures with the common market, based on the criteria laid down in Article 87(2) and (3) of the Treaty. This compatibility assessment is the exclusive responsibility of the Commission, subject to review by the Community courts. According to settled ECJ jurisprudence, national courts do not have the power to declare a State aid measure compatible with Article 87(2) or (3) of the Treaty (36).

21. The role of the national court depends on the aid measure at issue and whether that measure has been duly notified and approved by the Commission:

(a) National courts are often asked to intervene in cases where a Member State authority (37) has granted aid without respecting the standstill obligation. This situation arises either because the aid was not notified at all, or because the authority implemented it before getting the Commission's approval. The role of national courts in such cases is to protect the rights of individuals affected by the unlawful implementation of the aid (38).

(31) See paragraph 20.
(37) This includes authorities at national, regional and local level.
(38) Case C-368/04, Transalpine Olleitung in Österreich, cited above footnote 8, paragraphs 38 and 44; Joined Cases C-261/01 and C-262/01, Van Calster and Cleren, cited above footnote 35, paragraph 75; and Case C-293/97, Piaggio, cited above footnote 9, paragraph 31.
(b) National courts also play an important role in the enforcement of recovery decisions adopted under Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (39) (‘the Procedural Regulation’), where the Commission’s assessment concludes that aid granted unlawfully is incompatible with the common market and enjoins the Member State concerned to recover the incompatible aid from the beneficiary. The involvement of national courts in such cases usually arises from actions brought by beneficiaries for review of the legality of the repayment request issued by national authorities. However, depending on national procedural law, other types of legal action may be possible (such as actions by Member State authorities against the beneficiary aimed at the full implementation of a Commission recovery decision).

22. When preserving the interests of individuals, national courts must take full account of the effectiveness and direct effect (40) of Article 88(3) of the Treaty and the interests of the Community (41).

23. The role of national courts in such settings is set out in more detail under sections 2.2 and 2.3.

2.2. Role of national courts in enforcing Article 88(3) of the EC Treaty - Unlawful State Aid

24. Like Articles 81 and 82 EC, the standstill obligation laid down in Article 88(3) of the Treaty gives rise to directly effective individual rights of affected parties (such as the competitors of the beneficiary). These affected parties can enforce their rights by bringing legal action before competent national courts against the granting Member State. Dealing with such legal actions and thus protecting competitor’s rights under Article 88(3) of the Treaty is one of the most important roles of national courts in the State aid field.

25. The essential role played by national courts in this context also stems from the fact that the Commission’s own powers to protect competitors and other third parties against unlawful aid are limited. Most importantly, as the ECJ held in its ‘Boussac’ (42) and ‘Tubemeuse’ (43) judgments, the Commission cannot adopt a final decision ordering recovery merely because the aid was not notified in accordance with Article 88(3) of the Treaty. The Commission must therefore conduct a full compatibility assessment, regardless of whether the standstill obligation has been respected or not (44). This assessment can be time-consuming and the Commission’s powers to issue preliminary recovery injunctions are subject to very strict legal requirements (45).

26. As a result, actions before national courts offer an important means of redress for competitors and other third parties affected by unlawful State aid. Remedies available before national courts include:

(40) Case C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France, cited above footnote 8, paragraphs 11 and 12; and Case C-39/94, SEI and Others, cited above footnote 8, paragraphs 39 and 40.
(41) Case C-368/04, Transalpine Olleitung in Österreich, cited above footnote 8, paragraph 48.
(44) Case C-301/87, France v Commission, (‘Boussac’), cited above footnote 42, paragraphs 17 to 23; Case C-142/87, Belgium v Commission, (‘Tubemeuse’), cited above footnote 43, paragraphs 15 to 19; Case C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France, cited above footnote 8, paragraph 14; and Case C-199/06, CELF and Ministre de la Culture et de la Communication, cited above footnote 36, paragraph 38.
(45) Cf. Article 11(2) of the Procedural Regulation, which requires that there are no doubts about the aid character of the measure concerned, that there is an urgency to act and that there is a serious risk of substantial and irreparable damage to a competitor.
(a) preventing the payment of unlawful aid;

(b) recovery of unlawful aid (regardless of compatibility);

(c) recovery of illegality interest;

(d) damages for competitors and other third parties; and

(e) interim measures against unlawful aid.

27. Each of these remedies is set out in more detail in sections 2.2.1 to 2.2.6.

2.2.1. Preventing the payment of unlawful aid

28. National courts are obliged to protect the rights of individuals affected by violations of the standstill obligation. National courts must therefore draw all appropriate legal consequences, in accordance with national law, where an infringement of Article 88(3) of the Treaty has occurred (46). However, the national courts’ obligations are not limited to unlawful aid already disbursed. They also extend to cases where an unlawful payment is about to be made. As part of their duties under Article 88(3) of the Treaty, national courts must safeguard the rights of individuals against possible disregard of those rights (47). Where unlawful aid is about to be disbursed, the national court is therefore obliged to prevent this payment from taking place.

29. The national courts’ obligation to prevent the payment of unlawful aid can arise in a variety of procedural settings, depending on different types of actions available under national law. Very often, the claimant will seek to challenge the validity of the national act granting the unlawful State aid. In such cases, preventing the unlawful payment will usually be the logical consequence of finding that the granting act is invalid as a result of the Member State’s breach of Article 88(3) of the Treaty (48).

2.2.2. Recovery of unlawful aid

30. Where a national court is confronted with unlawfully granted aid, it must draw all legal consequences from this unlawfulness under national law. The national court must therefore in principle order the full recovery of unlawful State aid from the beneficiary (49). Ordering the full recovery of unlawful aid is part of the national court’s obligation to protect the individual rights of the claimant (such as the competitor) under Article 88(3) of the Treaty. The recovery obligation of the national court is thus not dependent on the compatibility of the aid measure with Article 87(2) or (3) of the Treaty.

(46) Case C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France, cited above footnote 8, paragraph 12; Case C-39/94, SFEI and Others, cited above footnote 8, paragraph 40; Case C-368/04, Transalpine Ölleitung in Österreich, cited above footnote 8, paragraph 47; and Case C-199/06, CELF and Ministre de la Culture et de la Communication, cited above footnote 36, paragraph 41.

(47) See references cited in footnote 38.

(48) On the invalidity of the granting act in cases where the Member State has violated Article 88(3) EC, see Case C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France, cited above footnote 8, paragraph 12; see also, as an illustration, German Federal Court of Justice (Bundesgerichtshof), judgment of 4 April 2003, V ZR 314/02, VIZ 2003, 340, and judgment of 20 January 2004, XI ZR 33/03, NVwZ 2004, 636.

(49) Case C-71/04, Xunta de Galicia, [2005] ECR I-7419, paragraph 49; Case C-39/94, SFEI and Others, cited above footnote 8, paragraphs 40 and 68; and Case C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France, cited above footnote 8, paragraph 12.
31. Since national courts must order the full recovery of unlawful aid regardless of its compatibility, recovery can be swifter before a national court than through a complaint with the Commission. Indeed, unlike the Commission (50), the national court can and must limit itself to determining whether the measure constitutes State aid and whether the standstill obligation applies to it.

32. However, the national courts’ recovery obligation is not absolute. According to the ‘SFEI’ jurisprudence (51), there can be exceptional circumstances in which the recovery of unlawful State aid would not be appropriate. The legal standard to be applied in this context should be similar to the one applicable under Articles 14 and 15 of the Procedural Regulation (52). In other words, circumstances which would not stand in the way of a recovery order by the Commission cannot justify a national court refraining from ordering full recovery under Article 88(3) of the Treaty. The standard which the Community courts apply in this respect is very strict (53). In particular, the ECJ has consistently held that, in principle, a beneficiary of unlawful aid cannot plead legitimate expectation against a Commission recovery order (54). This is because a diligent businessman would have been able to verify whether the aid he received was notified or not (55).

33. To justify the national court not ordering recovery under Article 88(3) of the Treaty, a specific and concrete fact must therefore have generated legitimate expectation on the beneficiary’s part (56). This can be the case if the Commission itself has given precise assurances that the measure in question does not constitute State aid, or that it is not covered by the standstill obligation (57).

34. In its ‘CELF’ judgment (58), the ECJ clarified that the national court’s obligation to order full recovery of unlawful State aid ceases if, by the time the national court renders its judgment, the Commission has already decided that the aid is compatible with the common market. Since the purpose of the standstill obligation is to ensure that only compatible aid can be implemented, this purpose can no longer be frustrated where the Commission has already confirmed compatibility (59). Therefore, the national court’s obligation to protect individual rights under Article 88(3) of the Treaty remains unaffected where the Commission has not yet taken a decision, regardless of whether a Commission procedure is pending or not (60).

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(50) Which needs to conduct a compatibility analysis before ordering recovery, see references cited in footnote 44.
(51) Case C-39/94, SFEI and Others, cited above footnote 8, paragraphs 70 and 71, referring to Advocate General Jacobs’ Opinion in this case, paragraphs 73 to 75; see also Case 223/85, RSV v Commission, [1987] ECR 4617, paragraph 17; and Case C-5/89, Commission v Germany, [1990] ECR I-3437, paragraph 16.
(52) On the standard applied in this respect, see Advocate General Jacobs’ Opinion in Case C-39/94, SFEI and Others, cited above footnote 8, paragraph 75.
(53) Article 14 only provides for an exemption from the Commission’s recovery obligation where a recovery would contravene general principles of Community law. The only case in which a Member State can refrain from implementing a recovery decision by the Commission is where such recovery would be objectively impossible, cf. Case C-177/06, Commission v Spain, [2007] ECR I-7689, paragraph 46. Also see paragraph 17 of the Notice from the Commission towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible aid (OJ C 272, 15.11.2007, p. 4).
(55) Case C-5/89, Commission v Germany, cited above footnote 51, paragraph 14; Case C-24/95, Alcan Deutschland, [1997] ECR I-1591, paragraph 25; and Joined Cases C-346/03 and C-529/03, Atzeni and Others, cited above footnote 34, paragraph 64.
(58) Case C-199/06, CELF and Ministre de la Culture et de la Communication, cited above footnote 36, paragraphs 45, 46 and 55; and Case C-384/07, Wienstrom, judgment of 11 December 2008, not yet published, paragraph 28.
(59) Case C-199/06, CELF and Ministre de la Culture et de la Communication, cited above footnote 36, paragraph 49.
(60) The judgment explicitly confirms the recovery obligation imposed by the ECJ in its previous jurisprudence, cf. Case C-199/06, CELF and Ministre de la Culture et de la Communication, cited above footnote 36, paragraph 41.
35. While after a positive Commission decision the national court is no longer under a Community law obligation to order full recovery, the EC also explicitly recognises that a recovery obligation may exist under national law (61). However, where such a recovery obligation exists, this is without prejudice to the Member State’s right to re-implement the aid subsequently.

36. Once the national court has decided that unlawful aid has been disbursed in violation of Article 88(3) of the Treaty, it must quantify the aid in order to determine the amount to be recovered. The case law of the Community courts on the application of Article 87(1) of the Treaty and the Commission’s guidance and decision making practice should assist the court in this respect. Should the national court encounter difficulties in calculating the aid amount, it may request the Commission’s support, as further set out in section 3 of this Notice.

2.2.3. Recovery of interest

37. The economic advantage of unlawful aid is not limited to its nominal amount. In addition, the beneficiary obtains a financial advantage resulting from the premature implementation of the aid. This is due to the fact that, had the aid been notified to the Commission, payment would (if at all) have taken place later. This would have obliged the beneficiary to borrow the relevant funds on the capital markets, including interest at market rates.

38. This undue time advantage is the reason why, if recovery is ordered by the Commission, Article 14(2) of the Procedural Regulation requires not only recovery of the nominal aid amount, but also recovery of interest from the day the unlawful aid was put at the disposal of the beneficiary to the day when it is effectively recovered. The interest rate to be applied in this context is defined in Article 9 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article [93] of the Treaty (‘the Implementing Regulation’) (62).

39. In its ‘CELF’ judgment, the ECJ clarified that the need to recover the financial advantage resulting from premature implementation of the aid (hereinafter referred to as ‘illegality interest’) is part of the national courts’ obligation under Article 88(3) of the Treaty. This is because the premature implementation of unlawful aid will at least cause competitors to suffer depending on the circumstances earlier than they would have to, in competition terms, from the effects of the aid. The beneficiary has therefore obtained an undue advantage (63).

40. The national court’s obligation to order the recovery of illegality interest can arise in two different settings:

(a) The national court must normally order full recovery of unlawful aid under Article 88(3) of the Treaty. Where this is the case, illegality interest needs to be added to the original aid amount when determining the total recovery amount.

(61) Case C-199/06, CELF and Ministre de la Culture et de la Communication, cited above footnote 36, paragraphs 53 and 55.
(63) Case C-199/06, CELF and Ministre de la Culture et de la Communication, cited above footnote 36, paragraphs 50 to 52 and 55.
(b) However, the national court must also order the recovery of illegality interest in circumstances in which, exceptionally, there is no obligation to order full recovery. As confirmed in ‘CELF’, the national court’s obligation to order recovery of illegality interest therefore remains in place even after a positive Commission decision \(^{(64)}\). This can be of central importance to potential claimants, since it also offers a successful remedy in cases where the Commission has already declared the aid compatible with the common market.

41. In order to comply with their recovery obligation as regards illegality interest, national courts need to determine the interest amount to be recovered. The following principles apply in this respect:

(a) The starting point is the nominal aid amount \(^{(65)}\).

(b) When determining the applicable interest rate and calculation method, national courts should take account of the fact that recovery of illegality interest by a national court serves the same purpose as the Commission’s interest recovery under Article 14 of the Procedural Regulation. In addition, claims for the recovery of illegality interest are Community law claims based directly on Article 88(3) of the Treaty \(^{(66)}\). The principles of equivalence and effectiveness described under section 2.4.1 of this Notice therefore apply to these claims.

(c) In order to ensure consistency with Article 14 of the Procedural Regulation and to comply with the effectiveness requirement, the Commission considers that the method of interest calculation used by the national court may not be less strict than that foreseen in the Implementing Regulation \(^{(67)}\). Consequently, illegality interest must be calculated on a compound basis and the applicable interest rate may not be lower than the reference rate \(^{(68)}\).

(d) Moreover, in the Commission’s view, it follows from the principle of equivalence that, where the interest rate calculation under national law is stricter than that laid down in the Implementing Regulation, the national court will have to apply the stricter national rules also to claims based on Article 88(3) of the Treaty.

(e) The start date for the interest calculation will always be the day on which the unlawful aid was put at the disposal of the beneficiary. The end date depends on the situation at the time of the national judgment. If, as was the case in ‘CELF’, the Commission has already approved the aid, the end date is the date of the Commission decision. Otherwise, illegality interest accumulates for the whole period of unlawfulness until the date of actual repayment of the aid by the beneficiary. As was confirmed in ‘CELF’, illegality interest also needs to be applied for the period between the adoption of a positive Commission decision and the subsequent annulment of this decision by the Community courts \(^{(69)}\).

\(^{(64)}\) Case C-199/06, CELF and Ministre de la Culture et de la Communication, cited above footnote 36, paragraphs 52 and 55.
\(^{(65)}\) See paragraph 36. Taxes paid on the nominal aid amount can be deducted for the purposes of recovery, see Case T-459/93 Siemens v Commission [1995] ECR II-1675, paragraph 83.
\(^{(66)}\) Case C-199/06, CELF and Ministre de la Culture et de la Communication, cited above footnote 36, paragraphs 52 and 55.
\(^{(67)}\) See chapter V of the Implementing Regulation.
\(^{(68)}\) See footnote 62.
\(^{(69)}\) Case C-199/06, CELF and Ministre de la Culture et de la Communication, cited above footnote 36, paragraph 69.
42. In case of doubt, the national court may ask the Commission for support under section 3 of this Notice.

2.2.4. Damages claims

43. As part of their role under Article 88(3) of the Treaty, national courts may also be required to uphold claims for compensation for damage caused to competitors of the beneficiary and to other third parties by the unlawful State aid (70). Such damages actions are usually directed at the State aid granting authority. They can be particularly important for the claimant, since, contrary to actions aimed at mere recovery, a successful damages action provides the claimant with direct financial compensation for suffered loss.

44. The ECJ has repeatedly held that affected third parties can bring such damages actions under national law (71). Such challenges are obviously dependent on national legal rules. Therefore, the legal bases on which claimants have relied in the past vary significantly across the Community.

45. Irrespective of the possibility to claim damages under national law, breaches of the standstill obligation have direct and binding consequences under Community law. This is because the standstill obligation under Article 88(3) of the Treaty is a directly applicable rule of Community law which is binding on all Member State authorities (72). Breaches of the standstill obligation can therefore, in principle, give rise to damages claims based on the ‘Francovich’ (73) and ‘Brasserie du Pêcheur’ (74) jurisprudence of the ECJ (75). This jurisprudence confirms that Member States are required to compensate for loss and damage caused to individuals as a result of breaches of Community law for which the State is responsible (76). Such liability exists where: (i) the rule of law infringed is intended to confer rights on individuals; (ii) the breach is sufficiently serious; and (iii) there is a direct causal link between the breach of the Member State’s obligation and the damage suffered by the injured parties (77).

46. The first requirement (Community law obligation aimed at protecting individual rights) is met in relation to violations of Article 88(3) of the Treaty. The ECJ has not only repeatedly confirmed the existence of individual rights under Article 88(3) of the Treaty but has also clarified that the protection of these individual rights is the genuine role of national courts (78).

(70) Case C-199/06, CELF and Ministre de la Culture et de la Communication, cited above footnote 36, paragraphs 53 and 55; Case C-368/04, Transalpine Ölleitung in Österreich, cited above footnote 8, paragraph 56; and Case C-334/07 P, Commission v Freistaat Sachsen, judgment of 11 December 2008, not yet published, paragraph 54.

(71) Case C-199/06, CELF and Ministre de la Culture et de la Communication, cited above footnote 36, paragraphs 53 and 55; Case C-368/04, Transalpine Ölleitung in Österreich, cited above footnote 8, paragraph 56; and Case C-39/94, SFEI and Others, cited above footnote 36, paragraph 75.

(72) Case 6/64, Costa v E.N.E.L., [1964] ECR 1141; Case 120/73, Lorenz GmbH v Bundesrepublik Deutschland and Others, [1973] ECR 1471, paragraph 8; and Case C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France, cited above footnote 8, paragraph 11.


(75) The fact that violations of the State aid rules can give rise to Member State liability directly on the basis of Community law has been confirmed in Case C-173/03 Traghetti del Mediterraneo v Italy, [2006] ECR I-5177, paragraph 41.

(76) Joined Cases C-6/90 and C-9/90, Francovich and Bonifaci v Italy, cited above footnote 73, paragraphs 31 to 37; and Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur and Factortame, cited above footnote 74, paragraph 31.

(77) See Case C-173/03, Traghetti del Mediterraneo v Italy, cited above footnote 75, paragraph 45.

(78) Case C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France, cited above footnote 8, paragraphs 12 to 14; Joined Cases C-261/01 and C-262/01, Van Calster and Cleren, cited above footnote 35, paragraphs 53; and Case C-199/06, CELF and Ministre de la Culture et de la Communication, cited above footnote 36, paragraph 38.
47. The requirement of a sufficiently serious breach of Community law will also generally be met as regards Article 88(3) of the Treaty. When determining whether or not a breach of Community law is sufficiently serious, the ECJ lays strong emphasis on the amount of discretion enjoyed by the authorities concerned (79). Where the authority in question has no discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (80). However, with regard to Article 88(3) of the Treaty, Member State authorities have no discretion not to notify State aid measures. They are, in principle, under an absolute obligation to notify all such measures prior to their implementation. Although the ECJ sometimes takes the excusability of the relevant breach of Community law into account (81), in the presence of State aid, Member State authorities cannot normally argue that they were not aware of the standstill obligation. This is because there is a large body of case law and Commission guidance on the application of Articles 87(1) and 88(3) of the Treaty. In case of doubt, Member States can always notify the measure to the Commission for reasons of legal certainty (82).

48. The third requirement that the breach of Community law must have caused an actual and certain financial damage to the claimant can be met in various ways.

49. The claimant will often argue that the aid was directly responsible for a loss of profit. When confronted with such a claim, the national court should take account of the following considerations:

(a) By virtue of the Community law requirements of equivalence and effectiveness (83), national rules may not exclude a Member State's liability for loss of profit (84). Damage under Community law can exist regardless of whether the breach caused the claimant to lose an asset or whether it prevented the claimant from improving his asset position. Should national law contain such an exclusion, the national court would need to leave the provision unapplied as regards damages claims under Article 88(3) of the Treaty.

(b) Determining the actual amount of lost profit will be easier where the unlawful aid enabled the beneficiary to win over a contract or a specific business opportunity from the claimant. The national court can then calculate the revenue which the claimant was likely to generate under this contract. In cases where the contract has already been fulfilled by the beneficiary, the national court would also take account of the actual profit generated.

(c) More complicated damage assessments are necessary where the aid merely leads to an overall loss of market share. One possible way for dealing with such cases could be to compare the claimant's actual income situation (based on the profit and loss account) with the hypothetical income situation had the unlawful aid not been granted.

(d) There may be circumstances where the damage suffered by the claimant exceeds the lost profit. This could, for example, be the case where, as a consequence of the unlawful aid, the claimant is forced out of business (through insolvency for example).

(81) Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur and Factortame, cited above footnote 74, paragraphs 87 and 90.
(82) Although breaches of Article 88(3) EC must therefore generally be regarded as sufficiently serious, there can be exceptional circumstances which stand in the way of a damages claim. In such circumstances, the requirement of a sufficiently serious breach may not be met. See paragraphs 32 and 33.
(83) See section 2.4.1.
50. The possibility to claim damages is, in principle, independent of any parallel Commission investigation concerning the same aid measure. Such an ongoing investigation does not release the national court from its obligation to safeguard individual rights under Article 88(3) of the Treaty (85). Since the claimant may be able to demonstrate that he suffered loss due to the premature implementation of the aid, and, more specifically, as a result of the beneficiary’s illegal time advantage, successful damages claims are also not ruled out where the Commission has already approved the aid by the time the national court decides (86).

51. National procedural rules will sometimes allow the national court to rely on reasonable estimates for the purpose of determining the actual amount of damages to be granted to the claimant. Where that is the case, and provided the principle of effectiveness (87) is respected, the use of such estimates would also be possible in relation to damages claims arising under Article 88(3) of the Treaty. This can be a useful tool for national courts which face difficulties in relation to the calculation of damages.

52. The legal prerequisites for damages claims under Community law and issues of damages calculation can also form the basis of requests for Commission assistance under section 3 of the present Notice.

2.2.5. Damages claims against the beneficiary

53. Potential claimants are entitled to bring damages claims against the State aid granting authority. However, there may be circumstances in which the claimant prefers to claim damages directly from the beneficiary.

54. In the ‘SFEI’ judgment, the ECJ explicitly addressed the question whether direct damages actions can be brought against the beneficiary under Community law. It concluded that, because Article 88(3) of the Treaty does not impose any direct obligations on the beneficiary, there is no sufficient Community law basis for such claims (88).

55. However, this does not in any way prejudice the possibility of a successful damages action against the beneficiary on the basis of substantive national law. In that context, the ECJ specifically referred to the possibility for potential claimants to rely on national rules governing non-contractual liability (89).

2.2.6. Interim measures

56. The duty of national courts to draw the necessary legal consequences from violations of the standstill obligation is not limited to their final judgments. As part of their role under Article 88(3) of the Treaty, national courts are also required to take interim measures where this is appropriate to safeguard the rights of individuals (90) and the effectiveness of Article 88(3) of the Treaty.

(85) Case C-39/94, SFEI and Others, cited above footnote 8, paragraph 44.
(86) Case C-199/06, CELF and Ministre de la Culture et de la Communication, cited above footnote 36, paragraphs 53 and 55.
(87) See Section 2.4.1.
(88) Case C-39/94, SFEI and Others, cited above footnote 8, paragraphs 72 to 74.
(90) Case C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France, cited above footnote 8, paragraph 12; Case C-39/94, SFEI and Others, cited above footnote 8, paragraph 52; and Case C-368/04, Transalpine Ölleitung in Österreich, cited above footnote 8, paragraph 46.
57. The power of national courts to adopt interim measures can be of central importance to interested
parties where fast relief is required. Because of their ability to act swiftly against unlawful aid, their
proximity and the variety of measures available to them, national courts are very well placed to take
interim measures where unlawful aid has already been paid or is about to be paid.

58. The most straightforward cases are those where unlawful aid has not yet been disbursed, but where
there is a risk that such payments will be made during the course of national court proceedings. In
such cases, the national court’s obligation to prevent violations of Article 88(3) of the Treaty (91) can
require it to issue an interim order preventing the illegal disbursement until the substance of the
matter is resolved.

59. Where the illegal payment has already been made, the role of national courts under Article 88(3) of
the Treaty usually requires them to order full recovery (including illegality interest). Because of the
principle of effectiveness (92), the national court may not postpone this by unduly delaying
proceedings. Such delays would not only affect the individual rights which Article 88(3) of the
Treaty protects, but also directly increase the competitive harm which stems from the unlawfulness
of the aid.

60. However, in spite of this general obligation, there may nevertheless be circumstances in which the
final judgment for the national court is delayed. In such cases, the obligation to protect the individual
rights under Article 88(3) of the Treaty requires the national court to use all interim measures
available to it under the applicable national procedural framework to at least terminate the anti-
competitive effects of the aid on a provisional basis (‘interim recovery’) (93). The application of national
procedural rules in this context is subject to the requirements of equivalence and effectiveness (94).

61. Where, based on the case law of the Community courts and the practice of the Commission, the
national judge has reached a reasonable prima facie conviction that the measure at stake involves
unlawful State aid, the most expedient remedy will, in the Commission’s view and subject to national
procedural law, be to order the unlawful aid and the illegality interest to be put on a blocked account
until the substance of the matter is resolved. In its final judgment, the national court would then
either order the funds on the blocked account to be returned to the State aid granting authority, if the
unlawfulness is confirmed, or order the funds to be released to the beneficiary.

62. Interim recovery can also be a very effective instrument in cases where national court proceedings run
parallel to a Commission investigation (95). An ongoing Commission investigation does not release the
national court from its obligation to protect individual rights under Article 88(3) of the Treaty (96).
The national court may therefore not simply suspend its own proceedings until the Commission has
decided and leave the rights of the claimant under Article 88(3) of the Treaty unprotected in the
meantime. Where the national court wishes to await the outcome of the Commission’s compatibility
assessment before adopting a final and irreversible recovery order, it should therefore adopt appro-
priate interim measures. Here again, ordering the placement of the funds on a blocked account would
seem an appropriate remedy. In cases where:

(91) See section 2.2.1.
(92) See section 2.4.1.
(93) See also Case C-39/94, SFEI and Others, cited above footnote 8, paragraph 52; and Case C-368/04, Transalpine
Ölleitung in Österreich, cited above footnote 8, paragraph 46.
(94) See section 2.4.1.
(95) See section 2.3.1 for guidance on interim measures in recovery cases.
(96) Case C-39/94, SFEI and Others, cited above footnote 8, paragraph 44.
(a) the Commission declares the aid incompatible, the national court would order the funds on the blocked account to be returned to the State aid granting authority (aid plus illegality interest);

(b) the Commission declares the aid compatible, this would release the national court from its Community law obligation to order full recovery (97). The court may therefore, subject to national law (98), order the actual aid amount to be released to the beneficiary. However, as described in section 2.2.3, the national court remains under a Community law obligation to order the recovery of illegality interest (99). This illegality interest will therefore have to be paid to the State aid granting authority.

2.3. Role of national courts in the implementation of negative Commission decisions ordering recovery

63. National courts can also face State aid issues in cases where the Commission has already ordered recovery. Although most cases will be actions for the annulment of a national recovery order, third parties can also claim damages from national authorities for failure to implement a Commission recovery decision.

2.3.1. Challenging the validity of a national recovery order

64. According to Article 14(3) of the Procedural Regulation, Member States must implement recovery decisions without delay. Recovery takes place according to the procedures available under national law, provided they allow for immediate and effective execution of the recovery decision. Where a national procedural rule prevents immediate and/or effective recovery, the national court must leave this provision unapplied (100).

65. The validity of recovery orders issued by national authorities to implement a Commission recovery decision is sometimes challenged before a national court. The rules governing such actions are set out in detail in the Commission's 2007 Recovery Notice (101), the main principles of which are summarised in this section.

66. In particular, national court actions cannot challenge the validity of the underlying Commission decision where the claimant could have challenged this decision directly before the Community courts (102). This also means that, where a challenge under Article 230 of the Treaty would have been possible, the national court may not suspend the execution of the recovery decision on grounds linked to the validity of the Commission decision (103).

67. Where it is not clear that the claimant can bring an annulment action under Article 230 of the Treaty (for example where the measure was an aid scheme with a wide coverage for which the claimant may not be able to demonstrate an individual concern), the national court must, in principle, offer legal protection. However, even in those circumstances, the national judge must request a preliminary ruling under Article 234 of the Treaty where the legal action concerns the validity and lawfulness of the Commission decision (104).

(97) Case C-199/06, CELF and Ministre de la Culture et de la Communication, cited above footnote 36, paragraphs 46 and 55.
(98) See paragraph 35.
(99) Case C-199/06, CELF and Ministre de la Culture et de la Communication, cited above footnote 36, paragraphs 52 and 55.
(100) Case C-232/05, Commission v France, (Scott), cited above footnote 34, paragraphs 49 to 53.
(101) Notice from the Commission towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible aid, cited above footnote 53, paragraphs 55 to 59.
(102) See references cited in footnote 34.
(103) Case C-232/05, Commission v France, (Scott), cited above footnote 34, paragraphs 59 and 60.
(104) See Case C-119/05 Lucchini, cited above footnote 32, paragraph 53.
68. Granting interim relief in such circumstances is subject to the very strict legal requirements defined in the ‘Zuckerfabrik’ (105) and ‘Atlanta’ (106) jurisprudence: a national court may only suspend recovery orders under the following conditions (i) the court has serious doubts as regards the validity of the Community act. If the validity of the contested act is not already in issue before the ECJ, it must itself refer the question to the ECJ; (ii) there must be urgency in the sense that the interim relief is necessary to avoid serious and irreparable damage to the party seeking relief; and (iii) the court has to take due account of the Community interest. In its assessment of all those conditions, the national court must respect any ruling by the Community courts on the lawfulness of the Commission decision or on an application for interim relief at Community level (107).

2.3.2. Damages for failure to implement a recovery decision

69. Like violations of the standstill obligation, failure by the Member State authorities to comply with a Commission recovery decision under Article 14 of the Procedural Regulation can give rise to damages claims under the ‘Francovich’ and ‘Brasserie du Pêcheur’ jurisprudence (108). In the Commission’s view, the treatment of such damages claims mirrors the principles as regards violations of the standstill obligation (109). This is because, (i) the Member State’s recovery obligation is aimed at protecting the same individual rights as the standstill obligation, and (ii) the Commission’s recovery decisions do not leave national authorities any discretion; breaches of the recovery obligation are thus, in principle, to be regarded as sufficiently serious. Consequently, the success of a damages claim for non-implementation of a Commission recovery decision will again depend on whether the claimant can demonstrate that he suffered loss directly as a result of the delayed recovery (110).

2.4. Procedural rules and legal standing before national courts

2.4.1. General principles

70. National courts are obliged to enforce the standstill obligation and protect the rights of individuals against unlawful State aid. In principle, national procedural rules apply to such proceedings (111). However, based on general principles of Community law, the application of national law in these circumstances is subject to two essential conditions:

(a) national procedural rules applying to claims under Article 88(3) of the Treaty may not be less favourable than those governing claims under domestic law (principle of equivalence) (112); and

(b) national procedural rules may not render excessively difficult or practically impossible the exercise of the rights conferred by Community law (principle of effectiveness) (113).

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(107) For further guidance, cf. 2007 Recovery Notice, paragraph 59.
(108) See references cited in footnote 77.
(109) See section 2.2.4.
(110) See paragraphs 48 to 51.
(111) Case C-368/04, Transalpine Ölleitung in Österreich, cited above footnote 8, paragraph 45; and Case C-526/04, Laboratoires Boiron, [2006] ECR I-7529, paragraph 51.
(113) Case C-368/04, Transalpine Ölleitung in Österreich, cited above footnote 8, paragraph 45; Case C-174/02, Streekgewest, [2005] ECR I-85, paragraph 18; and Case 33/76, Rew, cited above footnote 112, paragraph 5.
71. Given the supremacy of Community law, national courts must leave national procedural rules unapplied if doing otherwise would violate the principles set out in paragraph 70 (114).

2.4.2. Legal standing

72. The principle of effectiveness has a direct impact on the standing of possible claimants before national courts under Article 88(3) of the Treaty. In this respect, Community law requires that national rules on legal standing do not undermine the right to effective judicial protection (115). National rules cannot therefore limit legal standing only to the competitors of the beneficiary (116). Third parties who are not affected by the distortion of competition resulting from the aid measure can also have a sufficient legal interest of a different character (as has been recognised in tax cases) in bringing proceedings before a national court (117).

2.4.3. Standing issues in tax cases

73. The jurisprudence cited in paragraph 72 is particularly relevant for State aid granted in the form of exemptions from taxes and other financial liabilities. In such cases, it is not uncommon for persons who do not benefit from the same exemption to challenge their own tax burden based on Article 88(3) of the Treaty (118).

74. However, based on the jurisprudence of the Community courts, third party tax payers may only rely on the standstill obligation where their own tax payment forms an integral part of the unlawful State aid measure (119). This is the case where, under the relevant national rules, the tax revenue is reserved exclusively for funding the unlawful State aid and has a direct impact on the amount of State aid granted in violation of Article 88(3) of the Treaty (120).

75. If exemptions have been granted from general taxes, these criteria are usually not met. An undertaking liable to pay such taxes therefore cannot generally claim that someone else’s tax exemption is unlawful under Article 88(3) of the Treaty (121). It also results from settled case law that extending an illegal tax exemption to the claimant is no appropriate remedy for breaches of Article 88(3) of the Treaty. Such a measure would not eliminate the anticompetitive effects of unlawful aid, but on the contrary, strengthen them (122).

2.4.4. Gathering evidence

76. The principle of effectiveness can also influence the process of gathering evidence. For example, where the burden of proof as regards a particular claim makes it impossible or excessively difficult for a claimant to substantiate its claim (for example where the necessary documentary evidence is not in its possession), the national court is required to use all means available under national procedural law to give the claimant access to this evidence. This can include, where provided for under national law, the obligation for the national court to order the defendant or a third party to make the necessary documents available to the claimant (123).

(115) Case C-174/02, Streekgewest, cited above footnote 113, paragraph 18.
(116) Case C-174/02, Streekgewest, cited above footnote 113, paragraphs 14 to 21.
(117) Case C-174/02, Streekgewest, cited above footnote 113, paragraph 19.
(118) See statistics in paragraph 3. The imposition of an exceptional tax burden on specific sectors or producers can also amount to State aid in favour of other companies, see Case C-487/06 P British Aggregates Association v Commission, judgment of 22 December 2008, not yet published, paragraphs 81 to 86.
(119) Joined Cases C-393/04 and C-41/05, Air Liquide, cited above footnote 13, paragraph 46; Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, Casino France and Others, [2005] ECR I-9481, paragraph 40; and Case C-174/02, Streekgewest, cited above footnote 113, paragraph 26.
(120) Joined Cases C-393/04 and C-41/05, Air Liquide, cited above footnote 13, paragraph 48; and Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, Casino France and Others, cited above footnote 120, paragraphs 43 and 44.
(121) Joined Cases C-393/04 and C-41/05, Air Liquide, cited above footnote 13, paragraph 43.
(122) Joined Cases C-393/04 and C-41/05, Air Liquide, cited above footnote 13, paragraph 45.
(123) Case C-526/04, Laboratoires Boiron, cited above footnote 111, paragraphs 55 and 57.
77. According to Article 10 of the Treaty, the institutions of the Community and Member States have a mutual duty of loyal cooperation with a view to attaining the objectives of the EC Treaty. Article 10 of the Treaty thus implies that the Commission must assist national courts when they apply Community law (124). Conversely, national courts may be obliged to assist the Commission in the fulfilment of its tasks (125).

78. Given the key role which national courts play in the enforcement of the State aid rules, the Commission is committed to helping national courts where the latter find such assistance necessary for their decision on a pending case. Whilst the 1995 Cooperation Notice already offered national courts the possibility to ask the Commission for assistance, this possibility has not been used regularly by national courts. The Commission therefore wishes to make a fresh attempt at establishing closer cooperation with national courts by providing more practical and user-friendly support mechanisms. In doing so, it draws inspiration from the Antitrust Cooperation Notice (126).

79. Commission support to national courts can take two different forms:

(a) The national court may ask the Commission to transmit to it relevant information in its possession (see section 3.1).

(b) The national court may ask the Commission for an opinion concerning the application of the State aid rules (see section 3.2).

80. When supporting national courts, the Commission must respect its duty of professional secrecy and safeguard its own functioning and independence (127). In fulfilling its duty under Article 10 of the Treaty towards national courts, the Commission is therefore committed to remaining neutral and objective. Since the Commission's assistance to national courts is part of its duty to defend the public interest, the Commission has no intention to serve the private interests of the parties involved in the case pending before the national court. The Commission will therefore not hear any of the parties involved in the national proceedings about its assistance to the national court.

81. The support offered to national courts under this Notice is voluntary and without prejudice to the possibility or obligation (128) for the national court to ask the ECJ for a preliminary ruling regarding the interpretation or the validity of Community law in accordance with Article 234 of the Treaty.

3.1. Transmission of information to national courts

82. The Commission's duty to assist national courts in the application of State aid rules comprises the obligation to transmit relevant information in its possession to national courts (129).
83. A national court may, *inter alia*, ask the Commission for the following types of information:

(a) Information concerning a pending Commission procedure; this can, *inter alia*, include information on whether a procedure regarding a particular aid measure is pending before the Commission, whether a certain aid measure has been duly notified in accordance with Article 88(3) of the Treaty, whether the Commission has initiated a formal investigation, and whether the Commission has already taken a decision. In the absence of a decision, the national court may ask the Commission to clarify when this is likely to be adopted.

(b) In addition, national courts may ask the Commission to transmit documents in its possession. This can include copies of existing Commission decisions to the extent that these decisions are not already published on the Commission’s website, factual data, statistics, market studies and economic analysis.

84. In order to ensure efficiency in its cooperation with national courts, requests for information will be processed as quickly as possible. The Commission will endeavour to provide the national court with the requested information within one month from the date of the request. Where the Commission needs to ask the national court for further clarifications, this one-month period starts to run from the moment the clarification is received. Where the Commission has to consult third parties who are directly affected by the transmission of the information, the one-month period starts from the conclusion of this consultation. This could, for example, be the case for certain types of information submitted by a private person, or where information submitted by one Member State is being requested by a court in a different Member State.

85. In transmitting information to national courts, the Commission needs to uphold the guarantees given to natural and legal persons under Article 287 of the Treaty. Article 287 of the Treaty prevents members, officials and other servants of the Commission from disclosing information which is covered by the obligation of professional secrecy. This can include confidential information and business secrets.

86. Articles 10 and 287 of the Treaty do not lead to an absolute prohibition for the Commission to transmit to national courts information covered by professional secrecy. As confirmed by the Community courts, the duty of loyal cooperation requires the Commission to provide the national court with whatever information the latter may seek. This also includes information covered by the obligation of professional secrecy.

87. Where it intends to provide information covered by professional secrecy to a national court, the Commission will therefore remind the court of its obligations under Article 287 of the Treaty. It will ask the national court whether it can and will guarantee the protection of such confidential information and business secrets. Where the national court cannot offer such a guarantee, the Commission will not transmit the information concerned. Where, on the other hand, the national court has offered such a guarantee, the Commission will transmit the information requested.

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(130) Upon receipt of this information, the national court may ask for regular updates on the state of play.


(133) Case T-353/94, Postbank v Commission, cited above footnote 127, paragraph 64; and Order of 13 July 1990 in Case C-2/88 Imm., Zwartveld and Others, cited above footnote 124, paragraphs 16 to 22.

88. There are further scenarios where the Commission may be prevented from disclosing information to a national court. In particular, the Commission may refuse to transmit information to a national court where such transmission would interfere with the functioning and independence of the Communities. This would be the case where disclosure would jeopardise the accomplishment of the tasks entrusted to the Commission (135) (for example, information concerning the Commission’s internal decision making process).

3.2. Opinions on questions concerning the application of State aid rules

89. When called upon to apply State aid rules to a case pending before it, a national court must respect any relevant Community rules in the area of State aid and the existing case law of the Community courts. In addition, a national court may seek guidance in the Commission’s decision-making practice and in the notices and guidelines concerning the application of the State aid rules issued by the Commission. However, there may be circumstances in which these tools do not offer the national court sufficient guidance on the issues at stake. In the light of its obligations under Article 10 of the Treaty and given the important and complex role which national courts play in State aid enforcement, the Commission therefore gives national courts the opportunity to request the Commission’s opinion on relevant issues concerning the application of the State aid rules (136).

90. Such Commission opinions may, in principle, cover all economic, factual or legal matters which arise in the context of the national proceedings (137). Matters concerning the interpretation of Community law can obviously also lead the national court to ask for a preliminary ruling of the ECJ under Article 234 of the Treaty. Where no further judicial remedy exists against the court’s decision under national law, the use of this preliminary reference procedure is, in principle, mandatory (138).

91. Possible subject matters for Commission opinions include, inter alia:

(a) Whether a certain measure qualifies as State aid within the meaning of Article 87 of the Treaty and, if so, how the exact aid amount is to be calculated. Such opinions can relate to each of the criteria under Article 87 of the Treaty (namely, the existence of an advantage, granted by a Member State or through State resources, possible distortion of competition and effect on trade between Member States).

(b) Whether a certain aid measure meets a certain requirement of a Block Exemption Regulation so that no individual notification is necessary and the standstill obligation under Article 88(3) of the Treaty does not apply.

(c) Whether a certain aid measure falls under a specific aid scheme which has been notified and approved by the Commission or otherwise qualifies as existing aid. Also in such cases, the standstill obligation under Article 88(3) of the Treaty does not apply.


(136) See Case C-39/94, SFEI and Others, cited above footnote 8, paragraph 50.

(137) However, please note paragraph 92.

(138) Where the interpretation of EC law may be clearly deduced from existing case-law or where it leaves no scope for reasonable doubt, a court against whose decisions there is no judicial remedy under national law is not required to refer the case for a preliminary ruling by the Court of Justice, although it is free to do so. See Case 283/81 Çifit and others [1982] ECR 3415, paragraphs 14 to 20, and Joined Cases C-428/06 to C-434/06 Unión General de Trabajadores de la Rioja [2008] ECR I-0000, judgment of 11 September 2008, not yet reported, paragraphs 42 and 43.
(d) Whether exceptional circumstances (as referred to in the ‘SFEI’ judgment (139) exist which would prevent the national court from ordering full recovery under Community law.

(e) Where the national court is required to order the recovery of interest, it can ask the Commission for assistance as regards the interest calculation and the interest rate to be applied.

(f) The legal prerequisites for damages claims under Community law and issues concerning the calculation of the damage incurred.

92. As stated in paragraph 20, the assessment of the compatibility of an aid measure with the common market pursuant to Article 87(2) and 87(3) of the Treaty falls within the exclusive competence of the Commission. National courts are not competent to assess the compatibility of an aid measure. Whilst the Commission cannot, therefore, provide opinions on compatibility, this does not prevent the national court from requesting procedural information as to whether the Commission is already assessing the compatibility of a certain aid measure (or intends to do so) and, if so, when its decision is likely to be adopted (140).

93. When giving its opinion, the Commission 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. Moreover, unlike the authoritative interpretation of Community law by the Community courts, the opinion of the Commission does not legally bind the national court.

94. In the interest of making its cooperation with national courts as effective as possible, requests for Commission opinions will be processed as quickly as possible. The Commission will endeavour to provide the national court with the requested opinion within four months from the date of the request. Where the Commission needs to ask the national court for further clarifications concerning its request, this four-month period starts to run from the moment when the clarification is received.

95. In this context, it should be noted, however, that the general obligation of national courts to protect individual rights under Article 88(3) of the Treaty also applies during the period in which the Commission prepares the requested opinion. This is because, as set out in paragraph 62, the national court’s obligation to protect individual rights under Article 88(3) of the Treaty applies irrespective of whether a statement from the Commission is still awaited or not (141).

96. As already indicated in paragraph 80, the Commission will not hear the parties before providing its opinion to the national court. The introduction of the Commission’s opinion to the national proceeding is subject to the relevant national procedural rules, which have to respect the general principles of Community law.

(139) See references cited in footnote 51.

(140) See paragraph 83.

(141) This can include interim measures as outlined in section 2.2.6.
3.3. Practical issues

97. In order to further contribute to more effective cooperation and communication between the Commission and national courts, the Commission has decided to establish a single contact point, to which national courts can address all requests for support under sections 3.1 and 3.2, and any other written or oral questions about State aid policy that may arise in their daily work.

European Commission
Secretariat General
B-1049 Brussels
Belgium
Telephone 0032 2 29 76271
Fax 0032 2 29 98330
Email ec-amicus-state-aid@ec.europa.eu

98. The Commission will publish a summary concerning its cooperation with national courts pursuant to this Notice in its annual Report on Competition Policy. It may also make its opinions and observations available on its website.

4. FINAL PROVISIONS

99. This Notice is issued in order to assist national courts in the application of the State aid rules. It does not bind the national courts or affect their independence. The Notice also does not affect the rights and obligations of Member States and natural or legal persons under Community law.

100. This Notice replaces the 1995 Cooperation Notice.

101. The Commission intends to carry out a review of this Notice five years after its adoption.
1. INTRODUCTION

(1) This Communication sets out how the Commission intends to deal with requests by Member States, as addressees of State aid decisions, to consider parts of such decisions as covered by the obligation of professional secrecy and thus not to be disclosed when the decision is published.

(2) This involves two aspects, namely:

(a) the identification of the information which might be covered by the obligation of professional secrecy; and

(b) the procedure to be followed for dealing with such requests.

2. LEGAL FRAMEWORK

(3) Article 287 of the Treaty states that: ‘The members of the institutions of the Community, the members of committees, and the officials and other servants of the Community shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components’.

(4) This is also reflected in Articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (1).

(5) Article 253 of the Treaty states: ‘Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty’.

(6) Article 6(1), first sentence of Regulation (EC) No 659/1999 further stipulates with regard to decisions to initiate the formal investigation procedures: ‘The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the common market [...]’.

(7) The Court of Justice has established that although Article 287 of the Treaty primarily refers to information gathered from undertakings, the expression ‘in particular’ shows that the principle in question is a general one which applies also to other confidential information (2).

(8) It follows that professional secrecy covers both business secrets and other confidential information.

(9) There is no reason why the notions of business secret and other confidential information should be interpreted differently from the meaning given to these terms in the context of antitrust and merger procedures. The fact that in antitrust and merger procedures the addressees of the Commission decision are undertakings, while in State aid procedures the addressees are Member States, does not constitute an obstacle to a uniform approach as to the identification of what can constitute business secrets or other confidential information.

3. IDENTIFICATION OF INFORMATION WHICH CAN BE COVERED BY PROFESSIONAL SECRECY

(7) The Court of Justice has established that although Article 287 of the Treaty primarily refers to information gathered from undertakings, the expression ‘in particular’ shows that the principle in question is a general one which applies also to other confidential information (2).

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3.1. Business secrets

(10) Business secrets can only concern information relating to a business which has actual or potential economic value, the disclosure or use of which could result in economic benefits for other companies. Typical examples are methods of assessing manufacturing and distribution costs, production secrets (that is to say, a secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort) and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost price structure, sales policy, and information on the internal organisation of the undertaking.

(11) It would appear that in principle business secrets can only relate to the beneficiary of the aid (or other third party) and can only concern information submitted by the Member State (or third party). Hence, statements from the Commission itself (for example, expressing doubts about feasibility of a restructuring plan) cannot be covered by the obligation of professional secrecy.

(12) The simple fact that disclosure of information might cause harm to the company is not of itself sufficient grounds to consider that such information should be considered as business secret. For example, a Commission decision to initiate the formal investigation procedure in the case of a restructuring aid may cast doubt on certain aspects of the restructuring plan in the light of information the Commission has received. Such a decision could (further) affect the credit-position of that company. However, that would not necessarily lead to the conclusion that the information on which that decision was based must be considered as business secrets.

(13) In general, the Commission will apply the following non-exhaustive list of criteria to determine whether information can be deemed to constitute business secrets:

(a) the extent to which the information is known outside the company;

(b) the extent to which measures have been taken to protect the information within the company, for example, through non compete clauses or non-disclosure agreements imposed on employees or agents, etc;

(c) the value of the information for the company and its competitors;

(d) the effort or investment which the undertaking had to undertake to acquire the information;

(e) the effort which others would need to undertake to acquire or copy the information;

(f) the degree of protection offered to such information under the legislation of the Member State concerned.

(14) In principle, the Commission considers that the following information would not normally be covered by the obligation of professional secrecy:

(b) historical information, in particular information at least five years old;

(c) statistical or aggregate information;

(d) names of aid recipients, sector of activity, purpose and amount of the aid, etc.

(15) Detailed reasons must be given for any request to derogate from these principles in exceptional cases.

3.2. Other confidential information

(16) In antitrust and merger cases, confidential information includes certain types of information communicated to the Commission on condition that confidentiality is observed (for example a market study commissioned by an undertaking which is party to the procedure and forming part of its property). It seems that a similar approach could be retained for State aid decisions.

(17) In the field of State aid, there may, however, be some forms of confidential information, which would not necessarily be present in antitrust and merger procedures, referring specifically to secrets of the State or other confidential information relating to its organisational activity. Generally, in view of the Commission’s obligation to state the reasons for its decisions and the transparency requirement, such information can only in very exceptional circumstances be covered by the obligation of professional secrecy. For example, information regarding the organisation and costs of public services will not normally be considered ‘other confidential information’ (although it may constitute a business secret, if the criteria laid down in section 3.1 are met).

4. APPLICABLE PROCEDURE

4.1. General principles

(18) The Commission’s main task is to reconcile two opposing obligations, namely the requirement to state the reasons for its decisions under Article 253 of the Treaty and therefore ensure that its decisions contain all the essential elements on which they are based, and that of safeguarding the obligation of professional secrecy.

(19) Besides the basic obligation to state the reasons for its decisions, the Commission has to take into account the need for effective application of the State aid rules (inter alia, by giving Member States, beneficiaries and interested parties the possibility to comment on or challenge its decisions) and for transparency of its policy. There is therefore an overriding interest in making public the full substance of its decisions. As a general principle, requests for confidential treatment can only be granted where strictly necessary to protect business secrets or other confidential information meriting similar protection.
Business secrets and other confidential information do not enjoy an absolute protection: this means for example that they could be divulged when they are essential for the Commission's statement of the reasons for its decisions. This means that information necessary for the identification of an aid measure and its beneficiary cannot normally be covered by the obligation of professional secrecy. Similarly, information necessary to demonstrate that the conditions of Article 87(1) of the Treaty are met cannot normally be covered by the obligation of professional secrecy. However, the Commission will have to consider carefully whether the need for publication is more important, given the specific circumstances of a case, than the prejudice that might be generated for that Member State or undertaking involved.

The public version of a Commission decision can only feature deletions from the adopted version for reasons of professional secrecy. Paragraphs cannot be moved, and no sentence can be added or altered. Where the Commission considers that certain information cannot be disclosed, a footnote may be added, paraphrasing the non-disclosed information or indicating a range of magnitude or size, if useful to assure the comprehensibility and coherence of the decision.

Requests not to disclose the full text of a decision or substantial parts of it which would undermine the understanding of the Commission's statement of reasons cannot be accepted.

If there is a complainant involved, the Commission will take into account the complainant's interest in ascertaining the reasons why the Commission adopted a certain decision, without the need to have recourse to Court proceedings (1). Hence, requests by Member States for parts of the decision which address concerns of complainants to be covered by the obligation of professional secrecy will need to be particularly well reasoned and persuasive. On the other hand, the Commission will not normally be inclined to disclose information alleged to be of the kind covered by the obligation of professional secrecy. This means that information necessary for the identification of an aid measure and its beneficiary cannot normally be disclosed in full.

Where the Member State concerned wishes certain information to be covered by the obligation of professional secrecy, it must indicate the parts it considers to be covered and provide a justification in respect of each part for which non-disclosure is requested.

The Commission will then examine the request from the Member State without delay. If the Commission does not accept that certain parts of the decision are covered by the obligation of professional secrecy, it will state the reasons why in its view those parts cannot be left out of the public version of the decision. In the absence of an acceptable justification by the Member State for its request (i.e. reasoning which is not manifestly irrelevant or manifestly wrong), the Commission need not further specify the reasons why those parts cannot be left out of the public version of the decision other than by referring to the absence of justification.

If the Commission decides to accept that certain parts are covered by the obligation of professional secrecy without agreeing in full with the Member State's request, it will notify its decision with a new draft to the Member State indicating the parts which have been omitted. If the Commission accepts that the parts indicated by the Member State are covered by the obligation of professional secrecy, the text of the decision will be published pursuant to Article 26 of Regulation (EC) No 659/1999, with the omission of the parts covered by the obligation of professional secrecy. Such omissions will be indicated in the text (2).

The Member State will have 15 working days following receipt of the Commission's decision stating the reasons for its refusal to accept the non-disclosure of certain parts, to react and provide additional elements to justify its request.

If the Member State concerned does not react further within the period prescribed by the Commission, the Commission will normally publish the decision as indicated in its reply to the original request made by the Member State.

4.2. Procedure

The Commission currently notifies its decisions to the Member State concerned without delay and gives the latter the opportunity to indicate, normally within a time period of 15 working days, which information it considers to be covered by the obligation of professional secrecy. This time period may be extended by agreement between the Commission and the Member State concerned.

Where the Member State concerned does not indicate which information it considers to be covered by the obligation of professional secrecy within the period prescribed by the Commission, the decision will normally be disclosed in full.

Where the Member State concerned wishes certain information to be covered by the obligation of professional secrecy, it must indicate the parts it considers to be covered and provide a justification in respect of each part for which non-disclosure is requested.

The Commission will then examine the request from the Member State without delay. If the Commission does not accept that certain parts of the decision are covered by the obligation of professional secrecy, it will state the reasons why in its view those parts cannot be left out of the public version of the decision. In the absence of an acceptable justification by the Member State for its request (i.e. reasoning which is not manifestly irrelevant or manifestly wrong), the Commission need not further specify the reasons why those parts cannot be left out of the public version of the decision other than by referring to the absence of justification.

If the Commission decides to accept that certain parts are covered by the obligation of professional secrecy without agreeing in full with the Member State's request, it will notify its decision with a new draft to the Member State indicating the parts which have been omitted. If the Commission accepts that the parts indicated by the Member State are covered by the obligation of professional secrecy, the text of the decision will be published pursuant to Article 26 of Regulation (EC) No 659/1999, with the omission of the parts covered by the obligation of professional secrecy. Such omissions will be indicated in the text (2).

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If the Member State concerned does not react further within the period prescribed by the Commission, the Commission will normally publish the decision as indicated in its reply to the original request made by the Member State.

Using square brackets [...] and indicating in a footnote 'covered by the obligation of professional secrecy'.


(2) Using square brackets [...] and indicating in a footnote 'covered by the obligation of professional secrecy'.
(32) If the Member State concerned does submit any additional elements within the prescribed period, those elements will be examined by the Commission without delay. If the Commission accepts that the parts indicated by the Member State are covered by the obligation of professional secrecy, the text of the decision will be published as set out in paragraph (29).

(33) In the event that it is not possible to reach agreement, the Commission will proceed with the publication of its decision to initiate the formal investigation procedure forthwith. Such decisions must summarise the relevant issues of fact and law, include a preliminary assessment of the aid character of the proposed measure and set out the doubts as to its compatibility with the common market. Clearly certain essential information must be included in order to enable third parties and the other Member States to comment usefully. The duty of the Commission to provide such essential information will normally prevail over any claim to the protection of business secrets or other confidential information. Furthermore, it is in the interest of the beneficiary as well as interested parties to have access to such a decision as quickly as possible. Permitting any delay in this respect would jeopardise the process of State aid control.

(34) In the event that it is not possible to reach agreement on requests for certain information in decisions not to raise objections and decisions to close the formal investigation procedure to be covered by the obligation of professional secrecy, the Commission will notify its final decision to the Member State together with the text it intends to publish, giving the Member State another 15 working days to react. In the absence of an answer which the Commission considers pertinent, the Commission will normally proceed with the publication of the text.

(35) The Commission is currently reviewing its State aid notification forms. In order to avoid unnecessary correspondence with Member States and delay in the publication of decisions, it intends, in the future, to include in the form a question asking whether the notification contains information which should not be published, and the reasons for non-publication. Only if that question is answered in the affirmative will the Commission enter into correspondence with the Member State in respect of specific cases. Similarly, if additional information is required by the Commission, the Member State will have to indicate at the moment it provides the information requested whether such information should not be published, and the reasons for non-publication. If the Commission uses the information thus identified by the Member State in its decision, it will communicate the adopted decision to the Member State, stating the reasons why in its view these parts cannot be left out from the public version of the decision as laid down in paragraph (28).

(36) Once the Commission has decided what text it will publish and notified the Member State of its final decision, it is for the Member State to decide whether or not to make use of any judicial procedures available to it, including any interim measures, within the time limits provided for in Article 230 of the EC Treaty.

4.3. Third parties

(37) Where third parties other than the Member State concerned (for example, complainants, other Member States or the beneficiary) submit information in the context of State aid procedures, these guidelines will be applied mutatis mutandis.

4.4. Application in time

(38) These guidelines cannot establish binding legal rules and do not purport to do so. They merely set out in advance, in the interests of sound administration, the manner in which the Commission intends to address the issue of confidentiality in State aid procedures. As a rule, if agreement cannot be reached, the Commission's decision to publish may be the subject of specific judicial review proceedings. As these guidelines merely pertain to procedural matters (and to a large extent set out existing practice), they will be applied with immediate effect, including for decisions not to raise objections (1) adopted before the entry into force of Regulation (EC) No 659/1999 to which third parties seek access.

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(1) Decisions to initiate the formal investigation procedure and final decisions adopted before that date were already published in full in the Official Journal of the European Communities. Prior to publication, Member States could indicate whether any information was covered by the obligation of professional secrecy.
COMMISSION

Commission communication concerning the obsolescence of certain State aid policy documents

(2004/C 115/01)

(Text with EEA relevance)

Over the years, the Commission has adopted a number of texts concerning procedural issues in the field of State aid. Some of these texts have taken the form of Commission Communications to the Member States and have been published in the Official Journal of the European Union. Other texts have been published in volume IIA of the Competition Law in the European Communities series, Rules applicable to State aid, situation at 30 June 1998 (ISBN 92-828-4008-5).

Following the adoption by the Commission of Commission Regulation (EC) No 794/2004 (1) implementing Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (2), a number of these texts have become obsolete. These texts concern the notification obligation, notification procedures, including accelerated notifications, annual reporting, timelimits and recovery of unlawful aid.

Accordingly the Commission wishes to inform Member States and interested parties that from the date of publication of this communication in the Official Journal of the European Union, the Commission no longer intends to apply, in relation to any matter, the following documents, irrespective of their legal status:

1. Commission communication on the notification of State aid to the Commission pursuant to Article 93(3) of the EEC Treaty: the failure of Member States to respect their obligations (3);
2. Commission communication (on the notification obligation) (4);
3. Commission communication on the cumulation of aids for different purposes (5);
4. Commission letter to Member States SG(89) D/5521 of 27 April 1989 (on the definition of putting an aid into effect) (6);
5. Commission letter to Member States SG(91) D/4577 of 4 March 1991 (Communication to Member States concerning the procedures for the notification of aid plans and procedures applicable when aid is provided in breach of the rules of Article 93(3) of the EEC Treaty) (7);
6. Guidance note on use of the de minimis facility provided for in the SME guidelines (letter of 23 March 1993, IV/D/6878 from DG IV to the Member States) (8);
7. Commission letter to Member States of 22 February 1995 (interest rates to be applied when aid granted unlawfully is being recovered) (9);
8. Commission communication to the Member States (on the recovery of aid granted unlawfully) (10);
9. Commission letter to Member States of 22 February 1994 (concerning notifications) (11);

(4) OJ C 318, 24.11.1983, p. 3.
(5) OJ C 3, 05.01.1985, p. 2.
10. Section A of the joint procedure for reporting and notification under the EC Treaty and under the WTO Agreement as identified in Commission letter to Member States of 2 August 1995; (1)  

11. Commission letter to Member States SG(81) 12740 of 2 October 1981 (time limits for decisions); (2)  

12. Commission letter to Member States of 30 April 1987 (Procedure pursuant to Article 93(2) of the EEC Treaty – time-limits); (3)  

13. Commission communication to the Member States on the accelerated clearance of aid schemes for SMEs and of amendments of existing schemes; (4)  

14. Accelerated procedure for processing notifications of employment aid Standard notification form; (5)  

15. Commission letter to Member States of 27 June 1989 (Procedure pursuant to Article 93(2) of the EEC Treaty – Notice to Member States and other parties concerned to submit their comments); (6)  

16. Commission Letter to Member States of 11 October 1990 (Notice to Member States and other parties about aid cases not objected to by the Commission); (7)  

17. ‘Guide to procedures in State aid cases’; (8)  

However, the Commission also wishes to inform Member States and interested parties that in so far as the provisions of Chapter V of Regulation (EC) 794/2004 only apply to decisions ordering the recovery of unlawful aid notified to Member States after the date of entry into force of the Regulation, the Commission communication of 8 May 2003 on the interest rates to be applied when aid granted unlawfully is being recovered remains in effect as regards the execution by Member States of recovery orders notified before that date.


(11) OJ C 110, 8.5.2003, p. 21.