



European Commission

**Competition**

# **Enforcement of EU State aid law by national courts**

The Enforcement Notice  
and other relevant materials

**COMPETITION HANDBOOKS**



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Brussels, 2010

Enforcement of EU State aid law by national courts

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## Foreword



Ladies and Gentlemen,

Litigation on State aid issues before national courts in the EU has increased significantly in recent years. Private litigation now plays an important role in the overall enforcement of EU laws on State aid. I see this as one of the most important recent developments in the field of State aid, and one which I wholeheartedly welcome.

As judges, you are therefore increasingly one of the key actors in this field of law. In order to assist you, and to strengthen the development of effective private enforcement, the Commission has recently issued a new Notice on the enforcement of State aid law by national courts. The Notice introduces consultation mechanisms, enabling you to contact the Commission directly in order to obtain information or to seek the Commission's opinion on the application of the State aid rules.

This booklet gathers those EU materials most relevant for State aid enforcement in your daily work, including of course the new Notice. It has been designed as a practical tool, which we hope you will find useful. Should this selection of materials not give you the information you need, you will find a more complete collection of State aid materials on the Commission's competition website<sup>1</sup>.

I look forward to working with you on State aid issues in the future – I am confident that your input will be invaluable and that together we will be able to take forward this policy which is of crucial importance to business and consumers in Europe.

Joaquín Almunia  
Vice-President  
European Commission

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<sup>1</sup> [http://ec.europa.eu/competition/index\\_en.html](http://ec.europa.eu/competition/index_en.html)





## 1. Introduction

In order to assist national judges in the enforcement of State aid law, DG Competition has gathered the most important EU rules concerning State aid and the guidance material on this topic issued by the Commission. Other language versions of these documents and other relevant materials can be found on the EU's Competition website:

[http://ec.europa.eu/competition/index\\_en.html](http://ec.europa.eu/competition/index_en.html)

### 1.1. Elements of this publication

This publication contains the following documents:

- *The Enforcement Notice*

The Commission Notice on the enforcement of State aid law by national courts has two key aims: to explain the role of national courts in the State aid field as defined by the European Courts and to offer to national courts practical and user friendly support in individual cases. The Notice is the result of a comprehensive review of the Commission's 1995 notice on cooperation with national courts and takes into account recent legislative developments and case-law.

- *The Recovery Notice*

National courts play an important role in the enforcement of recovery decisions adopted by the Commission under Article 14(1) of Council Regulation (EC) No 659/1999. The Commission Notice "Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid" recalls the principles applying to the recovery of State aid as confirmed by the EU Courts' case law and defines the respective roles of the Commission and the Member States in the recovery process.

- *Treaty Provisions on State Aid*

The objective of State aid control as established by the Treaty on the Functioning of the European Union (TFEU) is to ensure that government interventions do not distort competition and intra-EU trade. Article 107 TFEU contains a general prohibition of all State aid measures, subject to possibility for the Commission to authorise aid measures in line with a series of defined objectives. According to Article 108(3) TFEU, aid measures can only be put into effect once the Commission has approved them ("standstill obligation").

- *The Procedural Regulation*

Council Regulation (EC) No 659/1999 lays down detailed rules for the application of Article 108 TFEU. This Regulation contains the procedural rules and principles governing State aid control. The Procedural Regulation is based on the Commission's practice in procedural matters and on the case-law of the Court of Justice.

- *Commission Regulations (block exemption and de minimis)*

The General Block Exemption Regulation gives automatic approval for a range of aid measures and therefore allows Member States to grant such aid without prior notification. The *de minimis* Regulation exempts small subsidies from the notification requirement. Since these Regulations have direct effect in the Member States' legal systems, national courts may have to assess whether a certain aid measure meets their requirements. Where this is the case, no individual notification is necessary and the standstill obligation under Article 108(3) TFEU does not apply.

▪ *Other Commission Communications and Notices*

When called upon to apply State aid rules to a case pending before it, a national court must respect any relevant EU rules in the area of State aid and the existing case law of the EU courts, in particular when assessing the presence of aid pursuant to Article 108(1) TFEU, which is addressed in the selection of Commission Communications and Notices reproduced under this heading. In addition, a national court may seek guidance in the Commission's decision-making practice and in the Communications and Notices concerning the application of the State aid rules issued by the Commission.

Please be aware of the fact that most of the materials in this booklet still refer to the numbering before the Treaty of Lisbon entered into force.

DG Competition has also launched dedicated pages on the cooperation with national courts on its website. These pages contain information as regards training opportunities, conferences and studies, as well as a compilation of State aid cases which have given rise to judgments of national courts. The pages can be consulted at:

[http://ec.europa.eu/competition/court/state\\_aid.html](http://ec.europa.eu/competition/court/state_aid.html)

Given the key role which national courts play in the enforcement of the State aid rules, the Commission is committed to assist national courts where they find such assistance necessary for their decision in a pending case. Commission support to national courts can take two different forms:

- a national court may ask the Commission to transmit to it relevant information in its possession;
- a national court may ask the Commission for an opinion concerning the application of the State aid rules.

National courts who wish to contact the Commission can do so by email, post, dedicated phone or fax:

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](mailto:ec-amicus-state-aid@ec.europa.eu)

## **2. The new Enforcement Notice**

### **2.1. Commission notice on the enforcement of State aid law by national courts**

Official Journal C 85, 09.04.2009, p. 1-22

## 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 <sup>(1)</sup> ('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 <sup>(2)</sup>.
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 <sup>(3)</sup> ('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 <sup>(4)</sup> ('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 <sup>(5)</sup>.
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 <sup>(6)</sup> and actions

<sup>(1)</sup> State Aid Action Plan: Less and better targeted State aid: a roadmap for State aid reform 2005-2009, COM(2005) 107 final.

<sup>(2)</sup> SAAP, paragraphs 55 and 56.

<sup>(3)</sup> OJ C 312, 23.11.1995, p. 8.

<sup>(4)</sup> Available at [http://ec.europa.eu/comm/competition/state\\_aid/studies\\_reports/studies\\_reports.cfm](http://ec.europa.eu/comm/competition/state_aid/studies_reports/studies_reports.cfm) The study only covered EU-15.

<sup>(5)</sup> A total increase from 116 cases to 357 cases.

<sup>(6)</sup> 51 % of all judgments.

brought by beneficiaries to challenge the recovery of unlawful and incompatible State aid <sup>(7)</sup>. 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 <sup>(8)</sup>.
11. The notion of State aid is not limited to subsidies <sup>(9)</sup>. It also comprises, *inter alia*, tax concessions and investments from public funds made in circumstances where a private investor would have withheld

<sup>(7)</sup> 12 % of all judgments.

<sup>(8)</sup> Case 78/76, *Steinike & Weinlig*, [1977] ECR 595, paragraph 14; Case C-39/94, *SFEI and Others*, [1996] ECR I-3547, paragraph 49; Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, [1991] ECR I-5505, paragraph 10; and Case C-368/04, *Transalpine Ölleitung in Österreich*, [2006] ECR I-9957, paragraph 39.

<sup>(9)</sup> Case C-308/01, *GIL Insurance and Others*, [2004] ECR I-4777, paragraph 69; Case C-387/92, *Banco Exterior de España v Ayuntamiento de Valencia*, [1994] ECR I-877, paragraph 13; Case C-295/97, *Piaggio*, [1999] ECR I-3735, paragraph 34; Case C-39/94, *SFEI*, cited above footnote 8 paragraph 58; Case C-237/04, *Enirisorse* [2006] ECR I-2843, paragraph 42; and Case C-66/02, *Italy v Commission* [2005] ECR I - 10901, paragraph 77.

his support<sup>(10)</sup>. 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<sup>(11)</sup>. But, for public support to be considered State aid, the aid needs to favour certain undertakings or the production of certain goods ('selectivity'), as opposed to general measures to which Article 87(1) of the Treaty does not apply<sup>(12)</sup>. In addition, the aid must distort or threaten to distort competition and must have an effect on trade between Member States<sup>(13)</sup>.

12. The case law of the Community courts<sup>(14)</sup> 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<sup>(15)</sup> and of the private creditor test<sup>(16)</sup>, the circumstances under which State guarantees must be regarded as State aid<sup>(17)</sup>, the treatment of public land sales<sup>(18)</sup>, privatisation and assimilated State actions<sup>(19)</sup>, aid below the *de minimis* thresholds<sup>(20)</sup>, export credit insurance<sup>(21)</sup>, direct business taxation<sup>(22)</sup>, risk capital investments<sup>(23)</sup>, and State aid for research, development and innovation<sup>(24)</sup>. 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

<sup>(10)</sup> 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'.

<sup>(11)</sup> Case 290/83, *Commission v France*, [1985] ECR 439, paragraph 14; and Case C-482/99, *France v Commission*, [2002] ECR I-4397, paragraphs 36 to 42.

<sup>(12)</sup> 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, *Slovan Neptun v Bodo Ziesemer*, [1993] ECR I-887.

<sup>(13)</sup> See, *inter alia*, Joined Cases C-393/04 and C-41/05, *Air Liquide Industries Belgium*, [2006] ECR I-5293, paragraphs 33 to 36; Case C-222/04, *Cassa di Risparmio de Firenze and Others*, [2006] ECR I-289, paragraphs 139 to 141; and Case C-310/99, *Italy v Commission*, [2002] ECR I-2289, paragraphs 84 to 86.

<sup>(14)</sup> A good example is the *Altmark* ruling of the ECJ, Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, [2003] ECR I-7747.

<sup>(15)</sup> On the private investor test in general, see Case C-142/87, *Belgium v Commission (Tubemeuse)* [1990] ECR I-959; Case C-305/89, *Italy v Commission (Alfa Romeo)*, [1991] ECR I-1603 paragraphs 19 and 20. As to its detailed reasoning, see Joined Cases T-228/99 and T-233/99, *Westdeutsche Landesbank Girozentrale v Commission*, [2003] ECR II-435, paragraph 245 et seq. See also Bulletin EC 9-1984, reproduced in 'Competition law in the European Communities', Volume IIA, and Communication of the Commission on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector, (OJ C 307, 13.11.1993, p. 3). As regards the application of this principle in relation to the financing of airports, see Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ C 312, 9.12.2005, paragraphs 42 to 52, p. 1).

<sup>(16)</sup> Case C-342/96, *Spain v Commission*, [1999] ECR I-2459, paragraph 34; and Case C-256/97, *DM Transport* [1999] ECR I-3913, paragraph 25.

<sup>(17)</sup> Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 155, 20.6.2008, p. 10).

<sup>(18)</sup> Commission Communication on State aid elements in sales of land and buildings by public authorities (OJ C 209, 10.7.1997, p. 3).

<sup>(19)</sup> XXIII Report on Competition Policy, paragraphs 401 to 402 and Case C-278/92, *Spain v Commission*, [1994] ECR I-4103.

<sup>(20)</sup> Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 379, 28.12.2006, p. 5); Commission Regulation (EC) No 875/2007 of 24 July 2007 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid in the fisheries sector and amending Regulation (EC) No 1860/2004 (OJ L 193, 25.7.2007, p. 6); and Commission Regulation (EC) No 1535/2007 of 20 December 2007 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid in the sector of agricultural production (OJ L 337, 21.12.2007, p. 35).

<sup>(21)</sup> 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).

<sup>(22)</sup> 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).

<sup>(23)</sup> Community Guidelines on State aid to promote risk capital investments in small and medium-sized enterprises (OJ C 194, 18.8.2006, p. 2).

<sup>(24)</sup> Community Framework for State aid for research and development and innovation (OJ C 323, 30.12.2006, p. 1).

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).

(25) The Standstill Obligation is reiterated in Article 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 (OJ L 83, 27.3.1999, p. 1) ('the Procedural Regulation'). As regards the exact time of the granting of an aid, see Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 379, 28.12.2006, p. 5) at recital 10.

(26) OJ L 142, 14.5.1998, p. 1.

(27) Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid (OJ L 10, 13.1.2001, p. 20); Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33); Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment (OJ L 337, 13.12.2002, p. 3) and Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid (OJ L 302, 1.11.2006, p. 29). The SME, training and employment Block Exemption Regulation were prolonged until 30 June 2008 by Commission Regulation (EC) No 1976/2006 of 20 December 2006 amending Regulations (EC) No 2204/2002, (EC) No 70/2001 and (EC) No 68/2001 as regards the extension of the periods of application (OJ L 368, 23.12.2006, p. 85). Specific Block Exemption Regulations apply in the fisheries and agricultural sector. See Commission Regulation (EC) No 736/2008 of 22 July 2008 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production, processing and marketing of fisheries products (OJ L 201, 30.7.2008, p. 16); and Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 (OJ L 358, 16.12.2006, p. 3).

(28) OJ L 214, 9.8.2008, p. 3. The General Block Exemption Regulation entered into force on 29 August 2008. The rules governing the transition to the new regime are contained in its Article 44.

(29) See Article 1 (b) 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 (OJ L 83, 27.3.1999, p. 1).

(30) 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 du croire 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 <sup>(31)</sup>.
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 <sup>(32)</sup>. 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 <sup>(33)</sup>. 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 <sup>(34)</sup>.
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 <sup>(35)</sup>.
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 <sup>(36)</sup>.
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 <sup>(37)</sup> 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 <sup>(38)</sup>.

<sup>(31)</sup> See paragraph 20.

<sup>(32)</sup> See Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 53.

<sup>(33)</sup> Case T-330/94, *Salt Union v Commission*, [1996] ECR II-1475, paragraph 39.

<sup>(34)</sup> Case C-188/92, *TWD Textilwerke Deggendorf v Germany*, [1994] ECR I-833, paragraphs 17, 25 and 26; see also Joined Cases C-346/03 and C-529/03, *Atzeni and Others*, [2006] ECR I-1875, paragraph 31; and Case C-232/05, *Commission v France*, ('Scott'), [2006] ECR I-10071, paragraph 59.

<sup>(35)</sup> Case C-368/04, *Transalpine Ölleitung in Österreich*, cited above footnote 8, paragraph 37; Joined Cases C-261/01 and C-262/01, *Van Calster and Cleeren*, [2003] ECR I-12249, paragraph 74; and Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 41.

<sup>(36)</sup> Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, [2008] ECR I-469, paragraph 38; Case C-17/91, *Lornoy and Others v Belgian State*, [1992] ECR I-6523, paragraph 30; and Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, cited above footnote 8, paragraph 14.

<sup>(37)</sup> This includes authorities at national, regional and local level.

<sup>(38)</sup> Case C-368/04, *Transalpine Ölleitung in Österreich*, cited above footnote 8, paragraphs 38 and 44; Joined Cases C-261/01 and C-262/01, *Van Calster and Cleeren*, cited above footnote 35, paragraph 75; and Case C-295/97, *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<sup>(39)</sup> ('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<sup>(40)</sup> of Article 88(3) of the Treaty and the interests of the Community<sup>(41)</sup>.

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'<sup>(42)</sup> and 'Tubemeuse'<sup>(43)</sup> 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<sup>(44)</sup>. This assessment can be time-consuming and the Commission's powers to issue preliminary recovery injunctions are subject to very strict legal requirements<sup>(45)</sup>.

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:

<sup>(39)</sup> OJ L 83, 27.3.1999, p. 1.

<sup>(40)</sup> 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, *SFEI and Others*, cited above footnote 8, paragraphs 39 and 40.

<sup>(41)</sup> Case C-368/04, *Transalpine Ölleitung in Österreich*, cited above footnote 8, paragraph 48.

<sup>(42)</sup> Case C-301/87, *France v Commission*, ('Boussac'), [1990] ECR I-307.

<sup>(43)</sup> Case C-142/87, *Belgium v Commission*, ('Tubemeuse'), [1990] ECR I-959.

<sup>(44)</sup> 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.

<sup>(45)</sup> 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<sup>(46)</sup>. 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<sup>(47)</sup>. 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<sup>(48)</sup>.

#### 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<sup>(49)</sup>. 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.

<sup>(46)</sup> 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.

<sup>(47)</sup> See references cited in footnote 38.

<sup>(48)</sup> 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 53/03, NVwZ 2004, 636.

<sup>(49)</sup> 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<sup>(50)</sup>, 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<sup>(51)</sup>, 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<sup>(52)</sup>. 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<sup>(53)</sup>. In particular, the ECJ has consistently held that, in principle, a beneficiary of unlawful aid cannot plead legitimate expectation against a Commission recovery order<sup>(54)</sup>. This is because a diligent businessman would have been able to verify whether the aid he received was notified or not<sup>(55)</sup>.
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<sup>(56)</sup>. 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<sup>(57)</sup>.
34. In its 'CELF' judgment<sup>(58)</sup>, 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<sup>(59)</sup>. 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<sup>(60)</sup>.

<sup>(50)</sup> Which needs to conduct a compatibility analysis before ordering recovery, see references cited in footnote 44.

<sup>(51)</sup> 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.

<sup>(52)</sup> 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.

<sup>(53)</sup> 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).

<sup>(54)</sup> Case C-5/89, *Commission v Germany*, cited above footnote 51, paragraph 14; Case C-169/95, *Spain v Commission*, [1997] ECR I-135, paragraph 51; and Case C-148/04, *Unicredito Italiano*, [2005] ECR I-11137, paragraph 104.

<sup>(55)</sup> 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.

<sup>(56)</sup> Cf. Advocate General Jacobs' Opinion in Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 73; and Case 223/85, *RSV v Commission*, cited above footnote 51, paragraph 17.

<sup>(57)</sup> Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* [2006] ECR I-5479, paragraph 147.

<sup>(58)</sup> 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.

<sup>(59)</sup> Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 36, paragraph 49.

<sup>(60)</sup> 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 ECJ also explicitly recognises that a recovery obligation may exist under *national law* <sup>(61)</sup>. 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') <sup>(62)</sup>.
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 <sup>(63)</sup>.
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.

<sup>(61)</sup> Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 36, paragraphs 53 and 55.

<sup>(62)</sup> OJ L 140, 30.4.2004, p. 1. On the method for setting the reference and discount rates, see the Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6) ('The Reference Rate Communication').

<sup>(63)</sup> 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<sup>(64)</sup>. 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<sup>(65)</sup>.
- (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<sup>(66)</sup>. 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<sup>(67)</sup>. Consequently, illegality interest must be calculated on a compound basis and the applicable interest rate may not be lower than the reference rate<sup>(68)</sup>.
- (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<sup>(69)</sup>.

<sup>(64)</sup> Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 36, paragraphs 52 and 55.

<sup>(65)</sup> 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.

<sup>(66)</sup> Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 36, paragraphs 52 and 55.

<sup>(67)</sup> See chapter V of the Implementing Regulation.

<sup>(68)</sup> See footnote 62.

<sup>(69)</sup> 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<sup>(70)</sup>. 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*<sup>(71)</sup>. 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<sup>(72)</sup>. Breaches of the standstill obligation can therefore, in principle, give rise to damages claims based on the 'Francovich'<sup>(73)</sup> and 'Brasserie du Pêcheur'<sup>(74)</sup> jurisprudence of the ECJ<sup>(75)</sup>. 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<sup>(76)</sup>. 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<sup>(77)</sup>.
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<sup>(78)</sup>.

<sup>(70)</sup> 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.

<sup>(71)</sup> 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 8, paragraph 75.

<sup>(72)</sup> 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.

<sup>(73)</sup> Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v Italy*, [1991] ECR I-5357.

<sup>(74)</sup> Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, [1996] ECR I-1029.

<sup>(75)</sup> 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.

<sup>(76)</sup> 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.

<sup>(77)</sup> See Case C-173/03, *Traghetti del Mediterraneo v Italy*, cited above footnote 75, paragraph 45.

<sup>(78)</sup> 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 Cleeren*, cited above footnote 35, paragraph 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 <sup>(79)</sup>. 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 <sup>(80)</sup>. 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 <sup>(81)</sup>, 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 <sup>(82)</sup>.
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 <sup>(83)</sup>, national rules may not exclude a Member State's liability for loss of profit <sup>(84)</sup>. 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).

<sup>(79)</sup> Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, cited above footnote 74, paragraph 55.

<sup>(80)</sup> Case C-278/05, *Robins and Others*, [2007] ECR I-1053, paragraph 71; Case C-424/97, *Haim*, [2000] ECR I-5123, paragraph 38; and Case C-5/94, *Hedley Lomas*, [1996] ECR I-2553, paragraph 28.

<sup>(81)</sup> Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, cited above footnote 74, paragraph 56.

<sup>(82)</sup> 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.

<sup>(83)</sup> See section 2.4.1.

<sup>(84)</sup> Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, cited above footnote 74, paragraphs 87 and 90.

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<sup>(85)</sup>. 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<sup>(86)</sup>.
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<sup>(87)</sup> 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<sup>(88)</sup>.
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<sup>(89)</sup>.

#### 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<sup>(90)</sup> and the effectiveness of Article 88(3) of the Treaty.

<sup>(85)</sup> Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 44.

<sup>(86)</sup> Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 36, paragraphs 53 and 55.

<sup>(87)</sup> See Section 2.4.1.

<sup>(88)</sup> Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraphs 72 to 74.

<sup>(89)</sup> Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 75. In situations involving a conflict of laws, the law applicable is determined by Regulation (EC) No 864/2007 of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II) (OJ L 199, 31.7.2007, p. 40).

<sup>(90)</sup> 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<sup>(91)</sup> 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<sup>(92)</sup>, 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')<sup>(93)</sup>. The application of national procedural rules in this context is subject to the requirements of equivalence and effectiveness<sup>(94)</sup>.
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<sup>(95)</sup>. An ongoing Commission investigation does not release the national court from its obligation to protect individual rights under Article 88(3) of the Treaty<sup>(96)</sup>. 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 appropriate interim measures. Here again, ordering the placement of the funds on a blocked account would seem an appropriate remedy. In cases where:

<sup>(91)</sup> See section 2.2.1.

<sup>(92)</sup> See section 2.4.1.

<sup>(93)</sup> 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.

<sup>(94)</sup> See section 2.4.1.

<sup>(95)</sup> See section 2.3.1 for guidance on interim measures in recovery cases.

<sup>(96)</sup> 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<sup>(97)</sup>. The court may therefore, subject to national law<sup>(98)</sup>, 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<sup>(99)</sup>. 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<sup>(100)</sup>.
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<sup>(101)</sup>, 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<sup>(102)</sup>. 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<sup>(103)</sup>.
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<sup>(104)</sup>.

<sup>(97)</sup> Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 36, paragraphs 46 and 55.

<sup>(98)</sup> See paragraph 35.

<sup>(99)</sup> Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, cited above footnote 36, paragraphs 52 and 55.

<sup>(100)</sup> Case C-232/05, *Commission v France*, ('Scott'), cited above footnote 34, paragraphs 49 to 53.

<sup>(101)</sup> 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.

<sup>(102)</sup> See references cited in footnote 34.

<sup>(103)</sup> Case C-232/05, *Commission v France*, ('Scott'), cited above footnote 34, paragraphs 59 and 60.

<sup>(104)</sup> 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' <sup>(105)</sup> and 'Atlanta' <sup>(106)</sup> 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 <sup>(107)</sup>.

#### 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 <sup>(108)</sup>. In the Commission's view, the treatment of such damages claims mirrors the principles as regards violations of the standstill obligation <sup>(109)</sup>. 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 <sup>(110)</sup>.

### 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 <sup>(111)</sup>. 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) <sup>(112)</sup>; 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) <sup>(113)</sup>.

<sup>(105)</sup> Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest v Hauptzollamt Itzehoe and Hauptzollamt Paderborn*, [1991] ECR I-415, paragraph 33.

<sup>(106)</sup> Case C-465/93, *Atlanta Fruchthandelsgesellschaft and Others v Bundesamt für Ernährung und Forstwirtschaft*, [1995] ECR I-3761, paragraph 51.

<sup>(107)</sup> For further guidance, cf. 2007 Recovery Notice, paragraph 59.

<sup>(108)</sup> See references cited in footnote 77.

<sup>(109)</sup> See section 2.2.4.

<sup>(110)</sup> See paragraphs 48 to 51.

<sup>(111)</sup> 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.

<sup>(112)</sup> Case C-368/04, *Transalpine Ölleitung in Österreich*, cited above footnote 8, paragraph 45; Joined Cases C-392/04 and C-422/04, *i-21 Germany*, [2006] ECR I-8559, paragraph 57; and Case 33/76, *Rewe*, [1976] ECR 1989, paragraph 5.

<sup>(113)</sup> 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, *Rewe*, 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<sup>(114)</sup>.

#### 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<sup>(115)</sup>. National rules cannot therefore limit legal standing only to the competitors of the beneficiary<sup>(116)</sup>. 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<sup>(117)</sup>.

#### 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<sup>(118)</sup>.

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<sup>(119)</sup>. 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<sup>(120)</sup>.

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<sup>(121)</sup>. 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<sup>(122)</sup>.

#### 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<sup>(123)</sup>.

<sup>(114)</sup> Case 106/77, *Amministrazione delle finanze dello Stato v Simmenthal*, [1978] ECR 629, paragraphs 21 and 24.

<sup>(115)</sup> Case C-174/02, *Streekgewest*, cited above footnote 113, paragraph 18.

<sup>(116)</sup> Case C-174/02, *Streekgewest*, cited above footnote 113, paragraphs 14 to 21.

<sup>(117)</sup> Case C-174/02, *Streekgewest*, cited above footnote 113, paragraph 19.

<sup>(118)</sup> 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.

<sup>(119)</sup> Case C-174/02, *Streekgewest*, cited above footnote 113, paragraph 19.

<sup>(120)</sup> 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.

<sup>(121)</sup> 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.

<sup>(122)</sup> Joined Cases C-393/04 and C-41/05, *Air Liquide*, cited above footnote 13, paragraph 45.

<sup>(123)</sup> Case C-526/04, *Laboratoires Boiron*, cited above footnote 111, paragraphs 55 and 57.

### 3. COMMISSION SUPPORT FOR NATIONAL COURTS

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 <sup>(124)</sup>. Conversely, national courts may be obliged to assist the Commission in the fulfilment of its tasks <sup>(125)</sup>.
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 <sup>(126)</sup>.
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 <sup>(127)</sup>. 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 <sup>(128)</sup> 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 <sup>(129)</sup>.

<sup>(124)</sup> Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 50; Order of 13 July 1990 in Case C-2/88 Imm., *Zwartveld and Others*, [1990] ECR I-3365, paragraphs 16 to 22; and Case C-234/89, *Delimitis v Henninger Bräu*, [1991] ECR I-935, paragraph 53.

<sup>(125)</sup> Case C-94/00, *Roquette Frères*, [2002] ECR I-9011, paragraph 31.

<sup>(126)</sup> Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (OJ C 101, 27.4.2004, p. 54), paragraphs 15 to 30.

<sup>(127)</sup> Order of 6 December 1990 in Case C-2/88 Imm., *Zwartveld and Others*, [1990] ECR I-4405, paragraphs 10 and 11; and Case T-353/94, *Postbank v Commission*, [1996] ECR II-921, paragraph 93.

<sup>(128)</sup> Based on Article 234 EC, a national court whose decision is not subject to further judicial review is under an obligation to initiate a preliminary reference to the ECJ in certain circumstances.

<sup>(129)</sup> Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 50; Order of 13 July 1990 in Case C-2/88 Imm., *Zwartveld and Others*, cited above footnote 124, paragraphs 17 to 22; Case C-234/89, *Delimitis v Henninger Bräu*, cited above footnote 124, paragraph 53; and Case T-353/94, *Postbank v Commission*, cited above footnote 127, paragraphs 64 and 65.

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<sup>(130)</sup>. 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<sup>(131)</sup>, 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<sup>(132)</sup>. 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<sup>(133)</sup>. 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<sup>(134)</sup>. Where, on the other hand, the national court has offered such a guarantee, the Commission will transmit the information requested.

<sup>(130)</sup> Upon receipt of this information, the national court may ask for regular updates on the state of play.

<sup>(131)</sup> Case T-353/94, *Postbank v Commission*, cited above footnote 127, paragraph 91.

<sup>(132)</sup> Case C-234/89, *Delimitis v Henninger Bräu*, cited above footnote 124, paragraph 53; and Case T-353/94, *Postbank v Commission*, cited above footnote 127, paragraph 90.

<sup>(133)</sup> 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.

<sup>(134)</sup> Case T-353/94, *Postbank v Commission*, cited above footnote 127, paragraph 93; and Order of 6 December 1990 in Case C-2/88 *Imm., Zwartveld and Others*, cited above footnote 127, paragraphs 10 and 11.

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<sup>(135)</sup> (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<sup>(136)</sup>.

90. Such Commission opinions may, in principle, cover all economic, factual or legal matters which arise in the context of the national proceedings<sup>(137)</sup>. 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<sup>(138)</sup>.

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.

<sup>(135)</sup> Order of 6 December 1990 in Case C-2/88 Imm., *Zwartveld and Others*, cited above footnote 127, paragraph 11; Case C-275/00, *First and Franex*, [2002] ECR I-10943, paragraph 49; and Case T-353/94, *Postbank v Commission*, cited above footnote 127, paragraph 93.

<sup>(136)</sup> See Case C-39/94, *SFEI and Others*, cited above footnote 8, paragraph 50.

<sup>(137)</sup> However, please note paragraph 92.

<sup>(138)</sup> 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 *Cilfit 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<sup>(139)</sup>) 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<sup>(140)</sup>.
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<sup>(141)</sup>.
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.

<sup>(139)</sup> See references cited in footnote 51.

<sup>(140)</sup> See paragraph 83.

<sup>(141)</sup> 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](mailto: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.

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### **3. The Recovery Notice**

#### **3.1. 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)

#### **3.2. Interest rates: Chapter V of Commission Regulation No 794/2004 of 21 April 2004 implementing Council Regulation No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [Article 108 TFEU], art. 9, 10 and 11, as amended by Commission Regulation No 271/2008 of 30 January 2008 amending Regulation No 794/2004 implementing Council Regulation No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [Article 108 TFEU], art. 1(3) and 1(4).**

(OJ L 140, 30.04.2004, p. 1 and OJ L 82, 25.3.2008, p.1)

**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 <sup>(1)</sup>. 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 distortive 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 <sup>(2)</sup> (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 <sup>(3)</sup> (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

<sup>(1)</sup> State Aid action plan: Less and better targeted State aid: a roadmap for State aid reform 2005-2009.

<sup>(2)</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

<sup>(3)</sup> 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](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 <sup>(4)</sup> 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 <sup>(5)</sup>, 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 <sup>(6)</sup>.
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 <sup>(7)</sup> (‘the Implementing Regulation’).
11. **Article 14(1)** of the Procedural Regulation confirms the constant case law of the Community Courts <sup>(8)</sup> 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 <sup>(9)</sup>. In addition, the Commission has also started to apply Deggendorf case law <sup>(10)</sup> in

<sup>(4)</sup> Case 70/72, *Commission v Germany*, [1973] ECR 813, paragraph 13.

<sup>(5)</sup> Case 121/73, *Markmann KG v Germany and Land of Schleswig-Holstein*, [1973] ECR 01495, Case 122/73, *Nordsee, Deutsche Hochseefischerei GmbH v Germany and Land Rheinland-Pfalz*, [1973] ECR 01511, and Case 141/73, *Fritz Lohrey v Germany and the Land Hessen*, [1973] ECR 01527.

<sup>(6)</sup> OJ C 318, 24.11.1983, p. 3.

<sup>(7)</sup> 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 (OJ L 140, 30.4.2004, p. 1).

<sup>(8)</sup> Case C-301/87, *France v Commission*, [1990] ECR I-307.

<sup>(9)</sup> Case C-415/03, *Commission v Greece*, (‘Olympic Airways’), [2005] ECR I-03875 and Case C-232/05, *Commission v France*, (‘Scott’), [2006], judgment of 5 October 2006.

<sup>(10)</sup> 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 <sup>(11)</sup>, but the logical consequence of the finding that it is unlawful <sup>(12)</sup>. It can therefore not be regarded as disproportionate to the objectives of the Treaty with regards to State Aid <sup>(13)</sup>.
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' <sup>(14)</sup>. 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 <sup>(15)</sup>.
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 <sup>(16)</sup> and that recovery must be immediate <sup>(17)</sup>. 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 <sup>(18)</sup> and of legal certainty <sup>(19)</sup>. 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 <sup>(20)</sup> or by a Member State, acting at the request of the Commission, with regard to the unlawful aid, shall interrupt the limitation period.

<sup>(11)</sup> Case C-75/97, *Belgium v Commission*, [1999] ECR I-03671, paragraph 65.

<sup>(12)</sup> Case C-183/91, *Commission v Greece*, [1993] ECR I-3131, paragraph 16.

<sup>(13)</sup> Joined Cases C-278/92, C-279/92 and C-280/92, *Spain v Commission*, [1994] ECR I-04103, paragraph 75.

<sup>(14)</sup> Case C-348/93, *Commission v Italy*, [1995] ECR I-673, paragraph 27.

<sup>(15)</sup> Case T-459/93, *Siemens v Commission*, [1995] ECR II-1675, paragraph 97 to 101.

<sup>(16)</sup> Case C-415/03, *Commission v Greece*, cited above footnote 9.

<sup>(17)</sup> Case C-232/05, *Commission v France*, cited above footnote 9.

<sup>(18)</sup> On the principle of the protection of the legitimate expectations, please see Case C-24/95, *Alcan*, [1997] ECR I-1591, paragraph 25, Case C-5/89, *BUG-Alutechnik*, [1990] ECR I-3437, paragraphs 13 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.

<sup>(19)</sup> On the principle of legal certainty, please see T-115/94, *Opel Austria GmbH v Council*, [1997] ECR II-00039 and Case C-372/97, *Italy v Commission*, [2004] ECR I-3679, paragraphs 116 to 118, Joined Cases C-74/00 P and C-75/00, P *Falck and Acciaierie di Bolzano v Commission*, [2002] ECR I-7869, paragraph 140. See also Case T-308/00, *Saltzgitter v Commission*, [2004] ECR II-01933, paragraph 166.

<sup>(20)</sup> For an interpretation of 'any Commission action', please see Case T-369/00, *Département du Loiret v Commission*, [2003] ECR II-01789.

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 <sup>(21)</sup>. 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 <sup>(22)</sup>.
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 <sup>(23)</sup>.
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 <sup>(24)</sup> or the absence of a recovery title under national law <sup>(25)</sup>, in order to justify its failure to comply with a recovery decision <sup>(26)</sup>. 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 <sup>(27)</sup>. 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 <sup>(28)</sup>. 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 <sup>(29)</sup>. Finally, the apprehension of even insurmountable internal difficulties cannot justify a failure by a Member State to fulfil its obligations under Community law <sup>(30)</sup>.

#### 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 <sup>(31)</sup>, 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 <sup>(32)</sup>, 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.

<sup>(21)</sup> Case 94/87, *Commission v Germany*, [1989] ECR 175.

<sup>(22)</sup> Case C-404/00, *Commission v Spain*, [2003] ECR I-6695.

<sup>(23)</sup> Case C-280/95, *Commission v Italy*, [1998] ECR I-259.

<sup>(24)</sup> Case C-24/95, *Alcan*, [1997] ECR 1591, paragraph 34-37.

<sup>(25)</sup> Case C-303/88, *Italy v Commission*, [1991] ECR I-1433.

<sup>(26)</sup> Case C-52/84, *Commission v Belgium*, [1986] ECR 89, paragraph 9.

<sup>(27)</sup> Case C-52/84, *Commission v Belgium*, cited above footnote 26, paragraph 14.

<sup>(28)</sup> Case C-499/99, *Commission v Spain*, [2002] ECR I-06301.

<sup>(29)</sup> Case C-280/95, *Commission v Italy*, cited above footnote 23.

<sup>(30)</sup> Case C-6/97, *Italy v Commission*, [1999] ECR I-2981, paragraph 34.

<sup>(31)</sup> Case C-415/03, *Commission v Greece*, cited above footnote 9.

<sup>(32)</sup> Case C-232/05, *Commission v France*, 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 obliges 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<sup>(33)</sup>. 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<sup>(34)</sup>. 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<sup>(35)</sup>.
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<sup>(36)</sup>.

### 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.

<sup>(33)</sup> Case C-404/00, *Commission v Spain*, cited above footnote 22.

<sup>(34)</sup> 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.

<sup>(35)</sup> For an illustration of proposals for implementation see Case C-209/00, *Commission v Germany*, [2002] ECR I-11695.

<sup>(36)</sup> 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 <sup>(37)</sup>. 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 <sup>(38)</sup>. Typical cases of circumvention are cases where the transfer does not reflect any economic logic other than the invalidation of the recovery order <sup>(39)</sup>.
34. As regards transfer of shares of a company that has to reimburse an illegal and incompatible aid (share deals), the ECJ held <sup>(40)</sup> 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 <sup>(41)</sup>. 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 <sup>(42)</sup>.
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 <sup>(43)</sup>.

*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' <sup>(44)</sup>.
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 <sup>(45)</sup>.

<sup>(37)</sup> Case C-303/88, *Italy v Commission*, [1991] ECR I-1433, paragraph 57; Case C-277/00, *Germany v Commission* ('SMI'), [2004] ECR I-3925, paragraph 75.

<sup>(38)</sup> Case C-277/00, *Germany v Commission*, cited above footnote 37.

<sup>(39)</sup> Case C-328/99 and C-399/00, *Italy and SMI 2 Multimedia Spa v Commission*. For another example of circumvention, see Case C-415/03, *Commission v Greece*, cited above footnote 9.

<sup>(40)</sup> Case C-328/99 and C-399/00, *Italy and SIM 2 Multimedia v Commission*, [2003] I-4035, paragraph 83.

<sup>(41)</sup> 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.

<sup>(42)</sup> Case C-277/00, *Germany v Commission*, cited above footnote 37, paragraph 80.

<sup>(43)</sup> Case C-310/99, *Italy v Commission*, [2002] ECR I-2289, paragraph 91.

<sup>(44)</sup> Case C-277/00, *Germany v Commission*, cited above footnote 37, paragraphs 74-76.

<sup>(45)</sup> Case C-480/98, *Spain v Commission*, [2000] ECR I 8717, paragraph 25 and Joint Cases C-67/85, C-68/85 and C-70/85, *Kwekerij van der Kooy BV and others v Commission*, [1988] ECR 219.

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 <sup>(46)</sup>. 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 <sup>(47)</sup>.
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 <sup>(48)</sup>.
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 <sup>(49)</sup>.

### 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 <sup>(50)</sup>. 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.

<sup>(46)</sup> See in that context, the exception of Case C-480/98, *Spain v Commission*, cited above footnote 45, paragraphs 36 and following.

<sup>(47)</sup> Case C-207/05, *Commission v Italy*, [2006] ECR I-00070, paragraph 31-36; see also Case C-378/98, *Commission v Belgium*, [2001] ECR I-5107, paragraph 28 and Case C-232/05, *Commission v France*, cited above footnote 9.

<sup>(48)</sup> Case C-5/86, *Commission v Belgium*, [1987] ECR 1773.

<sup>(49)</sup> Case C-207/05, *Commission v Italy*, [2006], judgement of 1 June 2006.

<sup>(50)</sup> Case 249/85, *Albako Margarinefabrik Maria von der Linde GmbH & Co. KG v Bundesanstalt für landwirtschaftliche Marktordnung*, [1987] ECR 02345.

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 <sup>(51)</sup>'. 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 <sup>(52)</sup>. 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 <sup>(53)</sup>.

<sup>(51)</sup> See page 521 of the Study.

<sup>(52)</sup> Case T-459/93, *Siemens v Commission*, [1995] ECR II-1675, paragraph 83. Please also see Case C-148/04, *Unicredito Spa v Agenzia delle Entrate, Ufficio Genova I*, [2005] ECR I-11137, paragraph 117-120.

<sup>(53)</sup> 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<sup>(54)</sup>. 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<sup>(55)</sup>.
53. More generally, Member States should not be able to place any obstacles in the way of carrying out a Commission recovery decision<sup>(56)</sup>. 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<sup>(57)</sup>.

#### 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<sup>(58)</sup>. 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<sup>(59)</sup>.

<sup>(54)</sup> 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.

<sup>(55)</sup> Case C-13/01, *Safalero*, [2003] ECR I-8679, paragraphs 49-50.

<sup>(56)</sup> Case C-48/71, *Commission v Italy*, [1972] ECR 00529.

<sup>(57)</sup> Case C-232/05, *Commission v France*, cited above footnote 9.

<sup>(58)</sup> Case C-188/92, *TWD Textilwerke Deggendorf GmbH v Germany*, cited above footnote 10.

<sup>(59)</sup> 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 <sup>(60)</sup>.
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 fulfils the conditions established by the ECJ in the cases *Zuckerfabrik* <sup>(61)</sup> and *Atlanta* <sup>(62)</sup>. 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 <sup>(63)</sup>.

#### 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 <sup>(64)</sup>.
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 <sup>(65)</sup>. 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.

<sup>(60)</sup> Case C-346/03, *Atzeni a.o.*, [2006], page I-01875, paragraph 30-34.

<sup>(61)</sup> Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen A.G. a.o.*, [1991] ECR I-415, paragraphs 23 and following.

<sup>(62)</sup> Case C-465/93, *Atlanta Fruchthandelsgesellschaft mbH a.o.*, [1995] ECR I-3761, paragraph 51.

<sup>(63)</sup> Case C-465/93, *Atlanta Fruchthandelsgesellschaft mbH a.o.*, cited above footnote 61, paragraph 51.

<sup>(64)</sup> Case C-42-93, *Spain v Commission* ('Merco'), [1994] ECR I-4175.

<sup>(65)</sup> Case C-52/84, *Commission v Belgium*, [1986] ECR p. 89.

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 <sup>(66)</sup> According to the ECJ case law, recovery will be done according to national bankruptcy rules <sup>(67)</sup>. 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 <sup>(68)</sup>.
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 <sup>(69)</sup>.

<sup>(66)</sup> C-142/87, *Commission v Belgium*, [1990] ECR I-959, paragraph 62.

<sup>(67)</sup> Case C-142/87, *ibid.* Case C-499/99, *Commission v Spain* ('Magesfa') [2002], ECR I-603, paragraphs 28-44.

<sup>(68)</sup> 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.

<sup>(69)</sup> 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 <sup>(70)</sup>). The Member State must ensure that the advantage linked to the unlawful and incompatible aid leaves the company <sup>(71)</sup>. 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 <sup>(72)</sup>.

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

73. In the event that 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 <sup>(73)</sup>, 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.

<sup>(70)</sup> 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.

<sup>(71)</sup> 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.

<sup>(72)</sup> Case C-224/01, *Köbler*, [2003] ECR I-10239, paragraphs 31-33; Case C-173/03, *Traghetti del Mediterraneo*, [2003] page I-05177, paragraphs 30-33.

<sup>(73)</sup> Communication from the Commission on the application of Article 228 of the EC Treaty — SEC/2005/1658 (OJ C 126, 7.6.2007, p. 15).

#### 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' <sup>(74)</sup>. 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 <sup>(75)</sup> 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 <sup>(76)</sup> and in recent Block Exemption Regulations <sup>(77)</sup>. 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 <sup>(78)</sup>.

#### 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.

<sup>(74)</sup> Case T-244/93 and T-486/93, *TWD Deggendorf v Commission*, [1995] ECR II-2265, paragraph 56.

<sup>(75)</sup> E.g. in the case of illegal and incompatible schemes where the amount and the beneficiaries are not known to the Commission.

<sup>(76)</sup> OJ C 244, 1.10.2004, p. 2, paragraph 23.

<sup>(77)</sup> Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid (OJ L 302, 1.11.2006, p. 29).

<sup>(78)</sup> *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.
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## I

(Acts whose publication is obligatory)

**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 <sup>(1)</sup>, 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 information 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 Countervailing 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 <sup>(2)</sup>, 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.

<sup>(1)</sup> OJ L 83, 27.3.1999, p. 1. Regulation as amended by the 2003 Act of Accession.

<sup>(2)</sup> OJ L 124, 8.6.1971, p. 1.

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 time-limits for action by the Commission, the receipt of the notification or subsequent correspondence in accordance with Article 3(1) and Article 3(2) of this Regulation shall be the relevant event for the purpose of Article 3(1) of Regulation (EEC, Euratom) No 1182/71.

As far as notifications transmitted after 31 December 2005, and correspondence relating to them are concerned, the receipt of the electronic notification or communication at the relevant address published in the *Official Journal of the European Union* shall be the relevant event.

4. With regard to time-limits for action by Member States, the receipt of the relevant notification or correspondence from the Commission in accordance with Art. 3(3) 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 fixed for each calendar year.

It shall be calculated on the basis of the average of the five-year inter-bank swap rates for September, October and November of the previous year, plus 75 basis points. In duly justified cases, the

Commission may increase the rate by more than 75 basis points in respect of one or more Member States.

2. If the latest three-month average of the five-year inter-bank swap rates available, plus 75 basis points, differs by more than 15 % from the State aid recovery interest rate in force, the Commission shall recalculate the latter.

The new rate shall apply from the first day of the month following the recalculation by the Commission. The Commission shall inform Member States by letter of the recalculation and the date from which it applies.

3. The interest rate shall be fixed for each Member State individually, or for two or more Member States together.

4. In the absence of reliable or equivalent data or in exceptional circumstances the Commission may, in close co-operation with the Member State(s) concerned, fix a State aid recovery interest rate, for one or more Member States, on the basis of a different method and on the basis of the information available to it.

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 five years have 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 five yearly intervals, taking as a basis the rate in force at the time of recalculation.

## I

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is obligatory)

## REGULATIONS

## COMMISSION REGULATION (EC) No 271/2008

of 30 January 2008

amending 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

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 <sup>(1)</sup>, and in particular Article 27 thereof,

After consulting the Advisory Committee on State Aid,

Whereas:

- (1) In order to facilitate and accelerate the submission of State aid notifications by Member States, and their assessment by the Commission, it is desirable to generalise the use of the already established electronic systems.
- (2) Since 1 January 2006 Member States have been required to transmit State aid notifications electronically. The web application State Aid Notification Interactive (SANI) <sup>(2)</sup> has become fully functional and has increased the efficiency of procedures. For these reasons, from 1 July 2008, its use should be rendered obligatory for Member States for the submission of State aid notifications to the Commission.

<sup>(1)</sup> OJ L 83, 27.3.1999, p. 1. Regulation as last amended by Council Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

<sup>(2)</sup> Details on the established web application are published in Commission notice 'D including addresses together with the arrangements for the protection of confidential information' (OJ C 237, 27.9.2005, p. 3).

- (3) Since 1 January 2006, Member States have also been required to transmit all correspondence in connection with notifications electronically. The secured e-mail system Public Key Infrastructure (PKI) <sup>(3)</sup> tested by the Commission has become fully functional. Its use should therefore be rendered obligatory, from 1 July 2008, for all correspondence from Member States to the Commission in connection with a notification.

- (4) In exceptional cases, upon the agreement of the Commission and the Member State concerned, it should be possible to use a communication channel other than the established web application or secured e-mail system.

- (5) Member States should be invited to submit a separate non-confidential version of the notification, on a voluntary basis, or any correspondence in connection with a notification where these documents contain confidential information. This should lead to shortening of procedures and should enable the Commission to decide more easily on requests for access to documents. The classification of the information as confidential should be justified by the Member State concerned. The submission of a separate non-confidential copy of the notification or any correspondence in connection with a notification is without prejudice to the assessment by the Commission of the confidential character of the information submitted.

<sup>(3)</sup> Details are published in Commission notice 'D including addresses together with the arrangements for the protection of confidential information'.

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.'

2. In Article 8, paragraphs 3 and 4 are replaced by the following:

'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.'

3. Article 9 is replaced by the following:

'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.

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

Done at Brussels, 30 January 2008.

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.'

4. In Article 11, paragraph 3 is replaced by the following:

'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.'

5. The Annexes are amended in accordance with the Annexes to this Regulation.

#### *Article 2*

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

*For the Commission*  
Neelie KROES  
*Member of the Commission*



## **4. Treaty Provisions on State Aid**

**4.1. Art 107 TFEU**

**4.2. Art 108 TFEU**

**4.3. Art 109 TFEU**

# Treaty on the Functioning of the European Union

## 4.1 Article 107

(ex Article 87 TEC)

1. Save as otherwise provided in the Treaties, 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 shall, in so far as it affects trade between Member States, be incompatible with the internal market.

2. The following shall be compatible with the internal market:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

3. The following may be considered to be compatible with the internal market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;

(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.



## 4.2 Article 108

(ex Article 88 TEC)

1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.

On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

3. 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 internal market having regard to Article 107, 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.

4. The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article.

### **4.3 Article 109**

(ex Article 89 TEC)

The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.

## **5. The Procedural Regulation**

- 5.1. Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [93] of the EC Treaty [Article 108 TFEU]**  
[OJ L 83, 27.3.1999, p. 1](#)

## 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 <sup>(1)</sup>,

Having regard to the opinion of the European Parliament <sup>(2)</sup>,

Having regard to the opinion of the Economic and Social Committee <sup>(3)</sup>,

(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;

<sup>(1)</sup> OJ C 116, 16. 4. 1998, p. 13.

<sup>(2)</sup> Opinion delivered on 14 January 1999 (not yet published in the Official Journal).

<sup>(3)</sup> OJ C 284, 14. 9. 1998, p. 10.

- (9) 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;
- (10) 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;
- (11) 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;
- (12) 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;
- (13) Whereas in cases of unlawful aid which is not compatible with the common market, effective competition should be restored; whereas for this purpose it is necessary that the aid, including interest, be recovered without delay; whereas it is appropriate that recovery be effected in accordance with the procedures of national law; whereas the application of those procedures should not, by preventing the immediate and effective execution of the Commission decision, impede the restoration of effective competition; whereas to achieve this result, Member States should take all necessary measures ensuring the effectiveness of the Commission decision;
- (14) Whereas for reasons of legal certainty it is appropriate to establish a period of limitation of 10 years with regard to unlawful aid, after the expiry of which no recovery can be ordered;
- (15) 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;
- (16) Whereas it is appropriate to define all the possibilities in which third parties have to defend their interests in State aid procedures;
- (17) 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;
- (18) 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;
- (19) 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;
- (20) 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;
- (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 suffi-

cient 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,
- or
- (b) introduction of procedural requirements,
- or
- (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).

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

Done at Brussels, 22 March 1999.

*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*.

*For the Council*

*The President*

G. VERHEUGEN

## **6. Commission Regulations (block exemption and de minimis)**

- 6.1. Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Article 87 and 88 of the Treaty Treaty [Articles 107 and 108 TFEU] (General block exemption Regulation)**

[Official Journal L 214 , 09/08/2008 P. 0003 - 0047](#)

- 6.2. Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty [Articles 107 and 108 TFEU] to de minimis aid**

[Official Journal L 379 of 28.12.2006](#)

## 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)

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to 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<sup>(1)</sup>, and in particular Article 1(1) points (a) and (b) thereof,

Having published a draft of this Regulation<sup>(2)</sup>,

After consulting the Advisory Committee on State Aid,

Whereas:

(1) Regulation (EC) No 994/98 empowers the Commission to declare, in accordance with Article 87 of the Treaty that under certain conditions aid to small and medium-sized enterprises ('SMEs'), aid in favour of research and development, aid in favour of environmental protection, employment and training aid, and aid that complies with the map approved by the Commission for each Member State for the grant of regional aid is compatible with the common market and not subject to the notification requirement of Article 88(3) of the Treaty.

(2) The Commission has applied Articles 87 and 88 of the Treaty in numerous decisions and gained sufficient experience to define general compatibility criteria as

regards aid in favour of SMEs, in the form of investment aid in and outside assisted areas, in the form of risk capital schemes and in the area of research, development and innovation, in particular in the context of the implementation of Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises<sup>(3)</sup>, and as regards the extension of the scope of that Regulation to include aid for research and development, the implementation of Commission Regulation (EC) No 364/2004 of 25 February 2004 amending Regulation (EC) No 70/2001<sup>(4)</sup>, the implementation of the Commission communication on State aid and risk capital<sup>(5)</sup> and the Community guidelines on State aid to promote risk capital investments in small and medium-sized enterprises<sup>(6)</sup>, as well as the implementation of the Community framework for State aid for research and development and innovation<sup>(7)</sup>.

(3) The Commission has also gained sufficient experience in the application of Articles 87 and 88 of the Treaty in the fields of training aid, employment aid, environmental aid, research and development and innovation aid and regional aid with respect to both SMEs and large enterprises, in particular in the context of the implementation of Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid<sup>(8)</sup>, Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment<sup>(9)</sup>, Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid<sup>(10)</sup> the Community framework for State aid for research and development<sup>(11)</sup>, the Community Framework for State aid for research and development and innovation, the 2001 Community guidelines on State for environmental protection<sup>(12)</sup>, the 2008 Community guidelines on State aid for environmental protection<sup>(13)</sup> and the Guidelines on national regional aid for 2007-2013<sup>(14)</sup>.

<sup>(3)</sup> OJ L 10, 13.1.2001, p. 33. Regulation as last amended by Regulation (EC) No 1976/2006 (OJ L 368, 23.12.2006, p. 85).

<sup>(4)</sup> OJ L 63, 28.2.2004, p. 22.

<sup>(5)</sup> OJ C 235, 21.8.2001, p. 3.

<sup>(6)</sup> OJ C 194, 18.8.2006, p. 2.

<sup>(7)</sup> OJ C 323, 30.12.2006, p. 1.

<sup>(8)</sup> OJ L 10, 13.1.2001, p. 20. Regulation as last amended by Regulation (EC) No 1976/2006.

<sup>(9)</sup> OJ L 337, 13.12.2002, p. 3. Regulation as last amended by Regulation (EC) No 1976/2006.

<sup>(10)</sup> OJ L 302, 1.11.2006, p. 29.

<sup>(11)</sup> OJ C 45, 17.2.1996, p. 5.

<sup>(12)</sup> OJ C 37, 3.2.2001, p. 3.

<sup>(13)</sup> OJ C 82, 1.4.2008, p. 1.

<sup>(14)</sup> OJ C 54, 4.3.2006, p. 13.

<sup>(1)</sup> OJ L 142, 14.5.1998, p. 1.

<sup>(2)</sup> OJ C 210, 8.9.2007, p. 14.

- (4) In the light of this experience, it is necessary to adapt some of the conditions laid down in Regulations (EC) Nos 68/2001, 70/2001, 2204/2002 and 1628/2006. For reasons of simplification and to ensure more efficient monitoring of aid by the Commission, those Regulations should be replaced by a single Regulation. Simplification should result from, amongst other things, a set of common harmonised definitions and common horizontal provisions laid down in Chapter I of this Regulation. In order to ensure the coherence of State aid legislation, the definitions of aid and aid scheme should be identical to the definitions provided for these concepts in Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty <sup>(1)</sup>. Such simplification is essential in order to ensure that the Lisbon Strategy for Growth and Jobs yields results, especially for SMEs.
- (5) This Regulation should exempt any aid that fulfils all the relevant conditions of this Regulation, and any aid scheme, provided that any individual aid that could be granted under such scheme fulfils all the relevant conditions of this Regulation. In order to ensure transparency, as well as more efficient monitoring of aid, any individual aid measure granted under this Regulation should contain an express reference to the applicable provision of Chapter II and to the national law on which the individual aid is based.
- (6) In order to monitor the implementation of this Regulation, the Commission should also be in a position to obtain all necessary information from Member States concerning the measures implemented under this Regulation. A failure of the Member State to provide information within a reasonable deadline on these aid measures may therefore be considered to be an indication that the conditions of this Regulation are not being respected. Such failure may therefore lead the Commission to decide that this Regulation, or the relevant part of this Regulation, should be withdrawn, for the future, as regards the Member State concerned and that all subsequent aid measures, including new individual aid measures granted on the basis of aid schemes previously covered by this Regulation, need to be notified to the Commission in accordance with Article 88 of the Treaty. As soon as the Member State has provided correct and complete information, the Commission should allow the Regulation to be fully applicable again.
- (7) State aid within the meaning of Article 87(1) of the Treaty not covered by this Regulation should remain subject to the notification requirement of Article 88(3) of the Treaty. This Regulation should be without prejudice to the possibility for Member States to notify aid the objectives of which correspond to objectives covered by this Regulation. Such aid will be assessed by the Commission in particular on the basis of the conditions set out in this Regulation and in accordance with the criteria laid down in specific guidelines or frameworks adopted by the Commission wherever the aid measure at stake falls within the scope of application of such specific instrument.
- (8) This Regulation should not apply to export aid or aid favouring domestic over imported products. In particular, it should not apply to aid financing the establishment and operation of a distribution network in other countries. Aid towards the cost of participating in trade fairs, or of studies or consultancy services needed for the launch of a new or existing product on a new market should not normally constitute export aid.
- (9) This Regulation should apply across virtually all sectors. In the sector of fisheries and aquaculture, this Regulation should exempt only aid in the fields of research and development and innovation, aid in the form of risk capital, training aid and aid for disadvantaged and disabled workers.
- (10) In the agricultural sector, in view of the special rules which apply in the primary production of agricultural products, this Regulation should exempt only aid in the fields of research and development, aid in the form of risk capital, training aid, environmental aid and aid for disadvantaged and disabled workers to the extent that these categories of aid are not covered by Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 <sup>(2)</sup>.
- (11) In view of the similarities between the processing and marketing of agricultural products and of non-agricultural products this Regulation should apply to the processing and marketing of agricultural products, provided that certain conditions are met.

<sup>(1)</sup> OJ L 83, 27.3.1999, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

<sup>(2)</sup> OJ L 358, 16.12.2006, p. 3.

- (12) Neither on-farm activities necessary for preparing a product for the first sale, nor the first sale to resellers or processors should be considered processing or marketing for the purposes of this Regulation. The Court of Justice of the European Communities has established that, once the Community has legislated for the establishment of a common organisation of the market in a given sector of agriculture, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it. This Regulation should therefore not apply to aid, the amount of which is fixed on the basis of price or quantity of products purchased or put on the market, nor should it apply to aid which is linked to an obligation to share it with primary producers.
- (13) In view of Council Regulation (EC) No 1407/2002 of 23 July 2002 on State aid to the coal industry <sup>(1)</sup>, this Regulation should not apply to aid favouring activities in the coal sector with the exception of training aid, research and development and innovation aid and environmental aid.
- (14) Where a regional aid scheme purports to realise regional objectives, but is targeted at particular sectors of the economy, the objective and likely effects of the scheme may be sectorial rather than horizontal. Therefore, regional aid schemes targeted at specific sectors of economic activity, as well as regional aid granted for activities in the steel sector, in the shipbuilding sector, as foreseen in the Commission communication concerning the prolongation of the Framework on State aid to shipbuilding <sup>(2)</sup>, and in the synthetic fibres sector, should not be covered by the exemption from notification. However, the tourism sector plays an important role in national economies and in general has a particularly positive effect on regional development. Regional aid schemes aimed at tourism activities should therefore be exempt from the notification requirement.
- (15) Aid granted to undertakings in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty <sup>(3)</sup> should be assessed under those Guidelines in order to avoid their circumvention. Aid to such undertakings should therefore be excluded from the scope of this Regulation. In order to reduce the administrative burden for Member States, when granting aid covered by this Regulation to SMEs, the definition of what is to be considered an undertaking in difficulty should be simplified as compared to the definition used in those Guidelines. Moreover, SMEs which have been incorporated for less than three years should not be considered, for the purposes of this Regulation, to be in difficulty with regard to that period, unless they fulfil the criteria under the relevant national law for being the subject of collective insolvency proceedings. That simplification should be without prejudice to the qualification of those SMEs under those Guidelines with regard to aid not covered by this Regulation and without prejudice to the qualification as undertakings in difficulty of large enterprises, under this Regulation, which remain subject to the full definition provided in those Guidelines.
- (16) The Commission has to ensure that authorised aid does not alter trading conditions in a way contrary to the general interest. Therefore, aid in favour of a beneficiary which is subject to an outstanding recovery order following a previous Commission Decision declaring an aid illegal and incompatible with the common market, should be excluded from the scope of this Regulation. As a consequence, any ad hoc aid paid out to such a beneficiary and any aid scheme not containing a provision explicitly excluding such beneficiaries remains subject to the notification requirements of Article 88(3) of the Treaty. That provision should not affect the legitimate expectations of beneficiaries of aid schemes which are not subject to outstanding recovery orders.
- (17) In order to ensure the consistent application of Community State aid rules, as well as for reasons of administrative simplification, the definitions of terms which are relevant to the various categories of aid covered by this Regulation should be harmonised.
- (18) For the purposes of calculating aid intensity, all figures used should be taken before any deduction of tax or other charge. For the purpose of calculating aid intensities, aid payable in several instalments should be discounted to its value at the moment of granting. The interest rate to be used for discounting purposes and for calculating the aid amount in aid not taking the form of a grant, should be the reference rate applicable at the time of grant, as laid down in the Communication from the Commission on the revision of the method for setting the reference and discount rates <sup>(4)</sup>.

<sup>(1)</sup> OJ L 205, 2.8.2002, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

<sup>(2)</sup> OJ C 260, 28.10.2006, p. 7.

<sup>(3)</sup> OJ C 244, 1.10.2004, p. 2.

<sup>(4)</sup> OJ C 14, 19.1.2008, p. 6.



- (19) In cases where aid is awarded by means of tax exemptions or reductions on future taxes due, subject to the respect of a certain aid intensity defined in gross grant equivalent, discounting of aid tranches should take place on the basis of the reference rates applicable at the various times the tax advantages become effective. In the case of tax exemptions or reductions on future taxes, the applicable reference rate and the exact amount of the aid tranches may not be known in advance. In such a case, Member States should set in advance a cap on the discounted value of the aid respecting the applicable aid intensity. Subsequently, when the amount of the aid tranche in a given year becomes known, discounting can take place on the basis of the reference rate applicable at that time. The discounted value of each aid tranche should be deducted from the overall amount of the cap.
- (20) For the purposes of transparency, equal treatment and effective monitoring, this Regulation should apply only to aid which is transparent. Transparent aid is aid for which it is possible to calculate precisely the gross grant equivalent *ex ante* without a need to undertake a risk assessment. Aid comprised in loans, in particular, should be considered transparent where the gross grant equivalent has been calculated on the basis of the reference rate as laid down in the Communication from the Commission on the revision of the method for setting the reference and discount rates. Aid comprised in fiscal measures should be considered transparent where the measure provides for a cap ensuring that the applicable threshold is not exceeded. In the case of reductions in environmental taxes, which are not subject to an individual notification threshold under this Regulation, no cap needs to be included for the measure to be considered transparent.
- (21) Aid comprised in guarantee schemes should be considered transparent when the methodology to calculate the gross grant equivalent has been approved following notification of this methodology to the Commission, and, in the case of regional investment aid, also when the Commission has approved such methodology after adoption of Regulation (EC) No 1628/2006. The Commission will examine such notifications on the basis of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees <sup>(1)</sup>. Aid comprised in guarantee schemes should also be considered transparent where the beneficiary is an SME and the gross grant equivalent has been calculated on the basis of the safe-harbour premiums laid down in points 3.3 and 3.5 of that Notice.
- (22) In view of the difficulty in calculating the grant equivalent of aid in the form of repayable advances, such aid should be covered by this Regulation only if the total amount of the repayable advance is inferior to the applicable individual notification threshold and the maximum aid intensities provided under this Regulation.
- (23) Due to the higher risk of distortion of competition, large amounts of aid should continue to be assessed by the Commission on an individual basis. Thresholds should therefore be set for each category of aid within the scope of this Regulation, at a level which takes into account the category of aid concerned and its likely effects on competition. Any aid granted above those thresholds remains subject to the notification requirement of Article 88(3) of the Treaty.
- (24) With a view to ensuring that aid is proportionate and limited to the amount necessary, thresholds should, whenever possible, be expressed in terms of aid intensities in relation to a set of eligible costs. Because it is based on a form of aid for which eligible costs are difficult to identify, the threshold with regard to aid in the form of risk capital should be formulated in terms of maximum aid amounts.
- (25) The thresholds in terms of aid intensity or aid amount should be fixed, in the light of the Commission's experience, at a level that strikes the appropriate balance between minimising distortions of competition in the aided sector and tackling the market failure or cohesion issue concerned. With respect to regional investment aid, this threshold should be set at a level taking into account the allowable aid intensities under the regional aid maps.
- (26) In order to determine whether the individual notification thresholds and the maximum aid intensities laid down in this Regulation are respected, the total amount of public support for the aided activity or project should be taken into account, regardless of whether that support is financed from local, regional, national or Community sources.
- (27) Moreover, this Regulation should specify the circumstances under which different categories of aid covered by this Regulation may be cumulated. As regards cumulation of aid covered by this Regulation with State aid not covered by this Regulation, regard should be had to the Decision of the Commission approving the aid not covered by this Regulation, as well as to the State aid rules on which that decision is based. Special provisions should apply in respect of cumulation of aid for disabled workers with other categories of aid, notably with investment aid, which can be calculated on the basis of the wage costs concerned. This Regulation should also make provision for cumulation of aid measures with identifiable eligible costs and aid measures without identifiable eligible costs.

<sup>(1)</sup> OJ C 155, 20.6.2008, p. 10.

- (28) In order to ensure that the aid is necessary and acts as an incentive to develop further activities or projects, this Regulation should not apply to aid for activities in which the beneficiary would already engage under market conditions alone. As regards any aid covered by this Regulation granted to an SME, such incentive should be considered present when, before the activities relating to the implementation of the aided project or activities are initiated, the SME has submitted an application to the Member State. As regards aid in the form of risk capital in favour of SMEs, the conditions laid down in this Regulation, notably with respect to the size of the investment tranches per target enterprise, the degree of involvement of private investors, the size of the company and the business stage financed, ensure that the risk capital measure will have an incentive effect.
- (29) As regards any aid covered by this Regulation granted to a beneficiary which is a large enterprise, the Member State should, in addition to the conditions applying to SMEs, also ensure that the beneficiary has analysed, in an internal document, the viability of the aided project or activity with aid and without aid. The Member State should verify that this internal document confirms a material increase in size or scope of the project/activity, a material increase in the total amount spent by the beneficiary on the subsidised project or activity or a material increase in the speed of completion of the project/activity concerned. As regards regional aid, incentive effect may also be established on the basis of the fact that the investment project would not have been carried out as such in the assisted region concerned in the absence of the aid.
- (30) As regards aid for disadvantaged or disabled workers, an incentive effect should be considered to be present by the fact that the aid measure concerned leads to a net increase in the number of disadvantaged or disabled workers hired by the undertaking concerned or leads to additional costs in favour of facilities or equipment devoted to disabled workers. Where the beneficiary of an aid for the employment of disabled workers in the form of wage subsidies was already benefiting from aid for employing disabled workers, which either fulfilled the conditions of Regulation (EC) No 2204/2002 or had been individually approved by the Commission, it is presumed that the condition of a net increase in the number of disabled workers, which was fulfilled for the pre-existing aid measures, continues to be fulfilled for the purpose of this Regulation.
- (31) Fiscal aid measures should be subject to specific conditions of incentive effect, in view of the fact that they are provided on the basis of different procedures than other categories of aid. Reductions in environmental taxes fulfilling the conditions of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity<sup>(1)</sup> and covered by this Regulation should be presumed to have an incentive effect in view of fact that these reduced rates contribute at least indirectly to an improvement of environmental protection by allowing the adoption or the continuation of the overall tax scheme concerned, thereby incentivising the undertakings subject to the environmental tax to reduce their level of pollution.
- (32) Moreover, as the incentive effect of ad hoc aid granted to large enterprises is considered to be difficult to establish, this form of aid should be excluded from the scope of application of this Regulation. The Commission will examine the existence of such incentive effect in the context of the notification of the aid concerned on the basis of the criteria established in the applicable guidelines, frameworks or other Community instruments.
- (33) In order to ensure transparency and effective monitoring in accordance with Article 3 of Regulation (EC) No 994/98, it is appropriate to establish a standard form to be used by Member States to provide the Commission with summary information whenever, in pursuance of this Regulation, an aid scheme or ad hoc aid is implemented. The summary information form should be used for the publication of the measure in the *Official Journal of the European Union* and on the internet. The summary information should be sent to the Commission in electronic format making use of the established IT application. The Member State concerned should publish on the internet the full text of such aid measure. In the case of ad hoc aid measures, business secrets may be deleted. The name of the beneficiary and the amount of aid should however not be considered a business secret. Member States should ensure that such text remains accessible on the internet as long as the aid measure is in force. With the exception of aid taking the form of fiscal measures, the act granting the aid should also contain a reference to the specific provision(s) of Chapter II of this Regulation relevant to such an act.
- (34) In order to ensure transparency and effective monitoring, the Commission should establish specific requirements as regards the form and the content of the annual reports to be submitted to the Commission by Member States. Moreover, it is appropriate to establish rules concerning the records that Member States should keep regarding the aid schemes and individual aid exempted by this Regulation, in view of the provisions of Article 15 of Regulation (EC) No 659/1999.

<sup>(1)</sup> OJ L 283, 31.10.2003, p. 51. Directive as last amended by Directive 2004/75/EC (OJ L 157, 30.4.2004, p. 100).

- (35) It is necessary to establish further conditions that should be fulfilled by any aid measure exempted by this Regulation. Having regard to Articles 87(3)(a) and 87(3)(c) of the Treaty, such aid should be proportionate to the market failures or handicaps that have to be overcome in order to be in the Community interest. It is therefore appropriate to limit the scope of this Regulation, as far as it concerns investment aid, to aid granted in relation to certain tangible and intangible investments. In the light of Community overcapacity and the specific problems of distortion of competition in the road freight and air transport sectors, so far as undertakings having their main economic activity in those transport sectors are concerned, transport means and equipment should not be regarded as eligible investment costs. Special provisions should apply as regards the definition of tangible assets for the purpose of environmental aid.
- (36) Consistent with the principles governing the aid falling within Article 87(1) of the Treaty, aid should be considered to be granted at the moment the legal right to receive the aid is conferred on the beneficiary under the applicable national legal regime.
- (37) In order not to favour the capital factor of an investment over the labour factor, provision should be made for the possibility of measuring aid to investment in favour of SMEs and regional aid on the basis of either the costs of the investment or the costs of employment directly created by an investment project.
- (38) Environmental aid schemes in the form of tax reductions, aid for disadvantaged workers, regional investment aid, aid for newly created small enterprises, aid for enterprises newly created by female entrepreneurs or aid in the form of risk capital granted to a beneficiary on an ad hoc basis may have a major impact on competition in the relevant market because it favours the beneficiary over other undertakings which have not received such aid. Because it is granted only to a single undertaking, ad hoc aid is likely to have only a limited positive structural effect on the environment, the employment of disabled and disadvantaged workers, regional cohesion or the risk capital market failure. For this reason, aid schemes concerning those categories of aid should be exempted under this Regulation, whilst ad hoc aid should be notified to the Commission. This Regulation should however exempt ad hoc regional aid when this ad hoc aid is used to supplement aid granted on the basis of a regional investment aid scheme, with a maximum limit for the ad hoc component of 50 % of the total aid to be granted for the investment.
- (39) The provisions of this Regulation relating to SME investment and employment aid should not provide, as was the case in Regulation (EC) No 70/2001, any possibility for increasing the maximum aid intensities by means of a regional bonus. However, it should be possible for the maximum aid intensities laid down in the provisions concerning regional investment aid to be granted also to SMEs, as long as the conditions for granting regional investment and employment aid are fulfilled. Similarly, the provisions relating to environmental investment aid should not provide any possibility for increasing the maximum aid intensities by means of a regional bonus. It should also be possible for the maximum aid intensities laid down in the provisions concerning regional investment aid to be applied to projects which have a positive impact on the environment, as long as the conditions for granting regional investment aid are fulfilled.
- (40) By addressing the handicaps of the disadvantaged regions, national regional aid promotes the economic, social and territorial cohesion of Member States and the Community as a whole. National regional aid is designed to assist the development of the most disadvantaged regions by supporting investment and job creation in a sustainable context. It promotes the setting-up of new establishments, the extension of existing establishments, the diversification of the output of an establishment into new additional products or a fundamental change in the overall production process of an existing establishment.
- (41) In order to prevent large regional investment projects from being artificially divided into sub-projects, thereby escaping the notification thresholds provided under this Regulation, a large investment project should be considered to be a single investment project if the investment is undertaken within a period of three years by the same undertaking or undertakings and consists of fixed assets combined in an economically indivisible way. To assess whether an investment is economically indivisible, Member States should take into account the technical, functional and strategic links and the immediate geographical proximity. The economic indivisibility should be assessed independently from ownership. This means that to establish whether a large investment project constitutes a single investment project, the assessment should be the same irrespective of whether the project is carried out by one undertaking, by more than one undertaking sharing the investment costs or by more undertakings bearing the costs of separate investments within the same investment project (for example in the case of a joint venture).

- (42) In contrast to regional aid, which should be confined to assisted areas, SME investment and employment aid should be able to be granted both in assisted and in non-assisted areas. The Member States should thus be able to provide, in assisted areas, investment aid as long as they respect either all conditions applying to regional investment and employment aid or all conditions applying to SME investment and employment aid.
- (43) The economic development of the assisted regions is hindered by relatively low levels of entrepreneurial activity and in particular by even lower than average rates of business start-ups. It is therefore necessary to include in this Regulation a category of aid, which can be granted in addition to regional investment aid, in order to provide incentives to support business start-ups and the early stage development of small enterprises in the assisted areas. In order to ensure that this aid for newly created enterprises in assisted regions is effectively targeted, this category of aid should be graduated in accordance with the difficulties faced by each category of region. Furthermore, in order to avoid an unacceptable risk of distortions of competition, including the risk of crowding-out existing enterprises, the aid should be strictly limited to small enterprises, limited in amount and degressive. Granting aid designed exclusively for newly created small enterprises or enterprises newly created by female entrepreneurs may produce perverse incentives for existing small enterprises to close down and re-open in order to receive this category of aid. Member States should be aware of this risk and should design aid schemes in such a way as to avoid this problem, for example by placing limits on applications from owners of recently closed firms.
- (44) The economic development of the Community may be hindered by low levels of entrepreneurial activity by certain categories of the population who suffer certain disadvantages, such as getting access to finance. The Commission has reviewed the possibility of market failure in this respect as regards a variety of categories of persons, and is at this stage in a position to conclude that women, in particular have lower than average rates of business start-ups as compared to men, as is evidenced, amongst others, by statistical data of Eurostat. It is therefore necessary to include in this Regulation a category of aid providing incentives for the creation of enterprises by female entrepreneurs in order to tackle the specific market failures women encounter most notably with respect to access to finance. Women also face particular difficulties linked to bearing caring costs for family members. Such aid should allow the achievement of substantive rather than formal equality between men and women by reducing *de facto* inequalities existing in the area of entrepreneurship, in line with the requirements of the case-law of the Court of Justice of the European Communities. At the expiry of this Regulation the Commission will have to reconsider whether the scope of this exemption and the categories of beneficiaries concerned remain justified.
- (45) Sustainable development is one of the main pillars in the Lisbon Strategy for Growth and Jobs, together with competitiveness and security of energy supplies. Sustainable development is based, amongst other things, on a high level of protection and improvement of the quality of the environment. Promoting environmental sustainability and combating climate change leads as well to increasing security of supply and ensuring the competitiveness of European economies and the availability of affordable energy. The area of environmental protection is often confronted with market failures in the form of negative externalities. Under normal market conditions, undertakings may not necessarily have an incentive to reduce their pollution since such reduction may increase their costs. When undertakings are not obliged to internalise the costs of pollution, society as a whole bears these costs. This internalisation of environmental costs can be ensured by imposing environmental regulation or taxes. The lack of full harmonisation of environmental standards at Community level creates an uneven playing field. Furthermore, an even higher level of environmental protection can be achieved by the initiatives to go beyond the mandatory Community standards, which may harm the competitive position of the undertakings concerned.
- (46) In view of the sufficient experience gathered in the application of the Community guidelines on State aid for environmental protection, investment aid enabling undertakings to go beyond Community standards for environmental protection or increase the level of environmental protection in the absence of Community standards, aid for the acquisition of transport vehicles which go beyond Community standards or which increase the level of environmental protection in the absence of Community standards, aid for early adaptation to future Community standards by SMEs, environmental aid for investment in energy saving, environmental aid for investment in high efficiency cogeneration, environmental aid for investments to promote renewable energy sources including investment aid relating to sustainable biofuels, aid for environmental studies and certain aid in the form of reductions in environmental taxes should be exempt from the notification requirement.

- (47) Aid in the form of tax reductions favouring environmental protection covered by this Regulation, should, in line with the Community guidelines on State aid for environmental protection, be limited to a period of 10 years. After this period, Member States should re-evaluate the appropriateness of the tax reductions concerned. This should be without prejudice to the possibility for Member States of re-adopting these measures or similar measures under this Regulation after having realised such re-evaluation.
- (48) A correct calculation of the extra investment or production costs to achieve environmental protection is essential to determine whether or not aid is compatible with Article 87(3) of the Treaty. As outlined in the Community guidelines on State aid for environmental protection, eligible costs should be limited to the extra investment costs necessary to achieve a higher level of environmental protection.
- (49) In view of the difficulties which may arise, in particular, with respect to the deduction of benefits deriving from extra investment, provision should be made for a simplified method of calculation of the extra investment costs. Therefore these costs should, for the purpose of applying this Regulation, be calculated without taking into account operating benefits, cost savings or additional ancillary production and without taking into account operating costs engendered during the life of the investment. The maximum aid intensities provided under this Regulation for the different categories of environmental investment aid concerned have therefore been reduced systematically as compared to the maximum aid intensities provided for by the Community guidelines on State aid for environmental protection.
- (50) As regards environmental aid for investment in energy saving measures it is appropriate to allow Member States to choose either the simplified method of calculation or the full cost calculation, identical to the one provided for in the Community guidelines on State aid for environmental protection. In view of the particular practical difficulties which may arise when applying the full cost calculation method, those cost calculations should be certified by an external auditor.
- (51) As regards environmental aid for investment in cogeneration and environmental aid for investments to promote renewable energy sources, the extra costs should, for the purpose of the application of this Regulation, be calculated without taking into account other support measures granted for the same eligible costs, with the exception of other environmental investment aid.
- (52) With regard to investments related to hydropower installations it should be noted that their environmental impact can be twofold. In terms of low greenhouse gas emissions they certainly provide potential. On the other hand, such installations might also have a negative impact, for example on water systems and biodiversity.
- (53) In order to eliminate differences that might give rise to distortions of competition and to facilitate coordination between different Community and national initiatives concerning SMEs, as well as for reasons of administrative clarity and legal certainty, the definition of SME used for the purpose of this Regulation should be based on the definition in Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium sized enterprises <sup>(1)</sup>.
- (54) SMEs play a decisive role in job creation and, more generally, act as a factor of social stability and economic drive. However, their development may be limited by market failures, leading to these SMEs suffering from typical handicaps. SMEs often have difficulties in obtaining capital, risk capital or loans, given the risk-averse nature of certain financial markets and the limited collateral that they may be able to offer. Their limited resources may also restrict their access to information, notably regarding new technology and potential markets. In order to facilitate the development of the economic activities of SMEs, this Regulation should therefore exempt certain categories of aid when they are granted in favour of SMEs. Consequently, it is justified to exempt such aid from prior notification and to consider that, for the purposes of the application of this Regulation only, when a beneficiary falls within the SME definition provided for in this Regulation, that SME can be presumed, when the aid amount does not exceed the applicable notification threshold, to be limited in its development by the typical SME handicaps prompted by market failures.
- (55) Having regard to the differences between small enterprises and medium-sized enterprises, different basic aid intensities and different bonuses should be set for small enterprises and for medium-sized enterprises. Market failures affecting SMEs in general, including difficulties of access to finance, result in even greater obstacles to the development of small enterprises as compared to medium-sized enterprises.

<sup>(1)</sup> OJ L 124, 20.5.2003, p. 36.

- (56) On the basis of the experience gained in applying the Community guidelines on State aid to promote risk capital investments in small and medium-sized enterprises there appear to be a number of specific risk capital market failures in the Community in respect of certain types of investments at certain stages of undertakings' development. These market failures result from an imperfect matching of supply and demand of risk capital. As a result, the level of risk capital provided in the market may be too restricted, and undertakings do not obtain funding despite having a valuable business model and growth prospects. The main source of market failure relevant to risk capital markets, which particularly affects access to capital by SMEs and which may justify public intervention, relates to imperfect or asymmetric information. Consequently, risk capital schemes taking the form of commercially managed investment funds in which a sufficient proportion of the funds are provided by private investors in the form of private equity promoting profit-driven risk capital measures in favour of target enterprises should be exempt from the notification requirement under certain conditions. The conditions that the investment funds should be commercially managed and that the ensuing risk capital measures be profit driven should not prevent the investment funds from targeting their activities and particular market segments, such as enterprises created by female entrepreneurs. This Regulation should not affect the status of the European Investment Fund and the European Investment Bank, as defined in the Community guidelines on risk capital.
- (57) Aid for research, development and innovation can contribute to economic growth, strengthening competitiveness and boosting employment. On the basis of its experience with the application of Regulation (EC) No 364/2004, the Community framework for State aid for research and development and the Community Framework for State aid for research and development and innovation, it appears that, given the available research and development capabilities of both SMEs and large enterprises, market failures may prevent the market from reaching the optimal output and lead to an inefficient outcome. Such inefficient outcomes generally relate to positive externalities/knowledge spill-overs, public goods/knowledge spill-overs, imperfect and asymmetric information and coordination and network failures.
- (58) Aid for research, development and innovation is of particular importance, especially for SMEs because one of the structural disadvantages of SMEs lies in the difficulty they may experience in gaining access to new technological developments, technology transfers or highly qualified personnel. Therefore, aid for research and development projects, aid for technical feasibility studies and aid to cover industrial property rights costs for SMEs, as well as aid for young innovative small enterprises, aid for innovation advisory services and for innovation support services and aid for the loan of highly qualified personnel should be exempt from the requirement of prior notification, under certain conditions.
- (59) As regards project aid for research and development, the aided part of the research project should completely fall within the categories of fundamental research, industrial research or experimental development. When a project encompasses different tasks, each task should be qualified as falling under the categories of fundamental research, industrial research or experimental development or as not falling under any of those categories at all. That qualification need not necessarily follow a chronological approach, moving sequentially over time from fundamental research to activities closer to the market. Accordingly, a task which is carried out at a late stage of a project may be qualified as industrial research. Similarly, it is not excluded that an activity carried out at an earlier stage of the project may constitute experimental development.
- (60) In the agricultural sector certain aid for research and development should be exempted if conditions similar to those provided in the specific provisions laid down for the agricultural sector in the Community framework for State aid for research and development and innovation are fulfilled. If those specific conditions are not fulfilled, it is appropriate to provide for the aid to be exempted if it fulfils the conditions set out in the general provisions related to research and development in this Regulation.
- (61) The promotion of training and the recruitment of disadvantaged and disabled workers and compensation of additional costs for the employment of disabled workers constitute a central objective of the economic and social policies of the Community and of its Member States.

- (62) Training usually has positive externalities for society as a whole since it increases the pool of skilled workers from which other firms may draw, improves the competitiveness of Community industry and plays an important role in the Community employment strategy. Training, including e-learning, is also essential for the constitution, the acquisition and the diffusion of knowledge, a public good of primary importance. In view of the fact that undertakings in the Community generally under-invest in the training of their workers, especially when this training is general in nature and does not lead to an immediate and concrete advantage for the undertaking concerned, State aid can help to correct this market failure. Therefore such aid should be exempt, under certain conditions, from prior notification. In view of the particular handicaps with which SMEs are confronted and the higher relative costs that they have to bear when they invest in training, the intensities of aid exempted by this Regulation should be increased for SMEs. The characteristics of training in the maritime transport sector justify a specific approach for that sector.
- (63) A distinction can be drawn between general and specific training. The permissible aid intensities should differ in accordance with the type of training provided and the size of the undertaking. General training provides transferable qualifications and substantially improves the employability of the trained worker. Aid for this purpose has less distortive effects on competition, meaning that higher intensities of aid can be exempted from prior notification. Specific training, which mainly benefits the undertaking, involves a greater risk of distortion of competition and the intensity of aid which can be exempted from prior notification should therefore be much lower. Training should be considered to be general in nature also when it relates to environmental management, eco-innovation or corporate social responsibility and thereby increases the capacity of the beneficiary to contribute to general objectives in the environment field.
- (64) Certain categories of disabled or disadvantaged workers still experience particular difficulty in entering the labour market. For this reason there is a justification for public authorities to apply measures providing incentives to undertakings to increase their levels of employment, in particular of workers from these disadvantaged categories. Employment costs form part of the normal operating costs of any undertaking. It is therefore particularly important that aid for the employment of disabled and disadvantaged workers should have a positive effect on employment levels of those categories of workers and should not merely enable undertakings to reduce costs which they would otherwise have to bear. Consequently, such aid should be exempt from prior notification when it is likely to assist those categories of workers in re-entering the job market or, as regards disabled workers, re-entering and staying in the job market.
- (65) Aid for the employment of disabled workers in the form of wage subsidies may be calculated on the basis of the specific degree of disability of the disabled worker concerned or may be provided as a lump sum provided that neither method leads to the aid exceeding the maximum aid intensity for each individual worker concerned.
- (66) It is appropriate to lay down transitional provisions for individual aid which was granted before the entry into force of this Regulation and was not notified in breach of the obligation provided for in Article 88(3) of the Treaty. With the repeal of Regulation (EC) No 1628/2006, the existing regional investment schemes, as exempted, should be allowed to continue being implemented under the conditions foreseen by that Regulation, in line with Article 9(2), second subparagraph, of that Regulation.
- (67) In the light of the Commission's experience in this area, and in particular the frequency with which it is generally necessary to revise State aid policy, it is appropriate to limit the period of application of this Regulation. Should this Regulation expire without being extended, aid schemes already exempted by this Regulation should continue to be exempted for a further period of six months, in order to give Member States time to adapt.
- (68) Regulation (EC) No 70/2001, Regulation (EC) No 68/2001 and Regulation (EC) No 2204/2002 expired on 30 June 2008 and Regulation (EC) No 1628/2006 should be repealed,

HAS ADOPTED THIS REGULATION:

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## CHAPTER I

## COMMON PROVISIONS

## Article 1

## Scope

1. This Regulation shall apply to the following categories of aid:

(a) regional aid;

(b) SME investment and employment aid;

(c) aid for the creation of enterprises by female entrepreneurs;

(d) aid for environmental protection;

(e) aid for consultancy in favour of SMEs and SME participation in fairs;

(f) aid in the form of risk capital;

(g) aid for research, development and innovation;

(h) training aid;

(i) aid for disadvantaged or disabled workers.

2. It shall not apply to:
- (a) aid to export-related activities, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current costs linked to the export activity;
  - (b) aid contingent upon the use of domestic over imported goods.
3. This Regulation shall apply to aid in all sectors of the economy with the exception of the following:
- (a) aid favouring activities in the fishery and aquaculture sectors, as covered by Council Regulation (EC) No 104/2000 <sup>(1)</sup>, except for training aid, aid in the form of risk capital, aid for research and development and innovation and aid for disadvantaged and disabled workers;
  - (b) aid favouring activities in the primary production of agricultural products, except for training aid, aid in the form of risk capital, aid for research and development, environmental aid, and aid for disadvantaged and disabled workers to the extent that these categories of aid are not covered by Commission Regulation (EC) No 1857/2006;
  - (c) aid favouring activities in the processing and marketing of agricultural products, in the following cases:
    - (i) when the amount of the aid is fixed on the basis of the price or quantity of such products purchased from primary producers or put on the market by the undertakings concerned; or
    - (ii) when the aid is conditional on being partly or entirely passed on to primary producers;
  - (d) aid favouring activities in the coal sector with the exception of training aid, research and development and innovation aid and environmental aid;
  - (e) regional aid favouring activities in the steel sector;
  - (f) regional aid favouring activities in the shipbuilding sector;
  - (g) regional aid favouring activities in the synthetic fibres sector.
4. This Regulation shall not apply to regional aid schemes which are targeted at specific sectors of economic activity within manufacturing or services. Schemes aimed at tourism activities are not considered targeted at specific sectors.
5. This Regulation shall not apply to ad hoc aid granted to large enterprises, except as provided for in Article 13(1).
6. This Regulation shall not apply to the following aid:
- (a) aid schemes which do not explicitly exclude the payment of individual aid in favour of an undertaking which is subject to an outstanding recovery order following a previous Commission Decision declaring an aid illegal and incompatible with the common market;
  - (b) ad hoc aid in favour of an undertaking which is subject to an outstanding recovery order following a previous Commission Decision declaring an aid illegal and incompatible with the common market;
  - (c) aid to undertakings in difficulty.
7. For the purposes of point (c) of paragraph 6, an SME shall be considered to be an undertaking in difficulty if it fulfils the following conditions:
- (a) in the case of a limited liability company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months; or
  - (b) in the case of a company where at least some members have unlimited liability for the debt of the company, where more than half of its capital as shown in the company accounts has disappeared and more than one quarter of that capital has been lost over the preceding 12 months; or
  - (c) whatever the type of company concerned, where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.
- An SME which has been incorporated for less than three years shall not be considered, for the purposes of this Regulation, to be in difficulty with regard to that period unless it meets the condition set out in point (c) of the first subparagraph.

<sup>(1)</sup> OJ L 17, 21.1.2000, p. 22.

## Article 2

**Definitions**

For the purposes of this Regulation the following definitions shall apply:

1. 'aid' means any measure fulfilling all the criteria laid down in Article 87(1) of the Treaty;
2. 'aid scheme' means 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;
3. 'individual aid' means:
  - (a) ad hoc aid; and
  - (b) notifiable awards of aid on the basis of an aid scheme;
4. 'ad hoc aid' means individual aid not awarded on the basis of an aid scheme;
5. 'aid intensity' means the aid amount expressed as a percentage of the eligible costs;
6. 'transparent aid' means aid in respect of which it is possible to calculate precisely the gross grant equivalent *ex ante* without need to undertake a risk assessment;
7. 'small and medium-sized enterprises' or 'SMEs' means undertakings fulfilling the criteria laid down in Annex I;
8. 'large enterprises' means undertakings not fulfilling the criteria laid down in Annex I;
9. 'assisted areas' means regions eligible for regional aid, as determined in the approved regional aid map for the Member State concerned for the period 2007-2013;
10. 'tangible assets' means, without prejudice to Article 17(12), assets relating to land, buildings and plant, machinery and equipment; in the transport sector transport means and transport equipment are considered eligible assets, except with regard to regional aid and except for road freight and air transport;
11. 'intangible assets' means assets entailed by the transfer of technology through the acquisition of patent rights, licences, know-how or unpatented technical knowledge;
12. 'large investment project' means an investment in capital assets with eligible costs above EUR 50 million, calculated at prices and exchange rates on the date when the aid is granted;
13. 'number of employees' means the number of annual labour units (ALU), namely the number of persons employed full time in one year, part-time and seasonal work being ALU fractions;
14. 'employment directly created by an investment project' means employment concerning the activity to which the investment relates, including employment created following an increase in the utilisation rate of the capacity created by the investment;
15. 'wage cost' means the total amount actually payable by the beneficiary of the aid in respect of the employment concerned, comprising:
  - (a) the gross wage, before tax;
  - (b) the compulsory contributions, such as social security charges; and
  - (c) child care and parent care costs;
16. 'SME investment and employment aid' means aid fulfilling the conditions laid down in Article 15;
17. 'investment aid' means, regional investment and employment aid under Article 13, SME investment and employment aid under Article 15 and investment aid for environmental protection under Articles 18 to 23;
18. 'disadvantaged worker' means any person who:
  - (a) has not been in regular paid employment for the previous 6 months; or
  - (b) has not attained an upper secondary educational or vocational qualification (ISCED 3); or
  - (c) is over the age of 50 years; or
  - (d) lives as a single adult with one or more dependents; or

- (e) works in a sector or profession in a Member State where the gender imbalance is at least 25 % higher than the average gender imbalance across all economic sectors in that Member State, and belongs to that underrepresented gender group; or
- (f) is a member of an ethnic minority within a Member State and who requires development of his or her linguistic, vocational training or work experience profile to enhance prospects of gaining access to stable employment;
19. 'severely disadvantaged worker' means any person who has been unemployed for 24 months or more;
20. 'disabled worker' means any person:
- (a) recognised as disabled under national law; or
- (b) having a recognised limitation which results from physical, mental or psychological impairment;
21. 'sheltered employment' means employment in an undertaking where at least 50 % of workers are disabled;
22. 'agricultural product' means:
- (a) the products listed in Annex I to the Treaty, except fishery and aquaculture products covered by Regulation (EC) No 104/2000;
- (b) products falling under CN codes 4502, 4503 and 4504 (cork products);
- (c) products intended to imitate or substitute milk and milk products, as referred to in Council Regulation (EC) No 1234/2007 <sup>(1)</sup>;
23. 'processing of agricultural products' means any operation on an agricultural product resulting in a product which is also an agricultural product, except on-farm activities necessary for preparing an animal or plant product for the first sale;
24. 'marketing of agricultural products' means holding or display with a view to sale, offering for sale, delivery or any other manner of placing on the market, except the first sale by a primary producer to resellers or processors and any activity preparing a product for such first sale; a sale by a primary producer to final consumers shall be considered to be marketing if it takes place in separate premises reserved for that purpose;
25. 'tourism activities' means the following activities in terms of NACE Rev. 2:
- (a) NACE 55: Accommodation;
- (b) NACE 56: Food and beverage service activities;
- (c) NACE 79: Travel agency, tour operator reservation service and related activities;
- (d) NACE 90: Creative, arts and entertainment activities;
- (e) NACE 91: Libraries, archives, museums and other cultural activities;
- (f) NACE 93: Sports activities and amusement and recreation activities;
26. 'repayable advance' means a loan for a project which is paid in one or more instalments and the conditions for the reimbursement of which depend on the outcome of the research and development and innovation project;
27. 'risk capital' means finance provided through equity and quasi-equity financing to undertakings during their early-growth stages (seed, start-up and expansion phases);
28. 'enterprise newly created by female entrepreneurs' means a small enterprise fulfilling the following conditions:
- (a) one or more women own at least 51 % of the capital of the small enterprise concerned or are the registered owners of the small enterprise concerned; and
- (b) a woman is in charge of the management of the small enterprise;
29. 'steel sector' means all activities related to the production of one or more of the following products:
- (a) pig iron and ferro-alloys:
- pig iron for steelmaking, foundry and other pig iron, spiegeleisen and high-carbon ferro-manganese, not including other ferro-alloys;

<sup>(1)</sup> OJ L 299, 16.11.2007, p. 1.

- (b) crude and semi finished products of iron, ordinary steel or special steel:

liquid steel cast or not cast into ingots, including ingots for forging semi finished products: blooms, billets and slabs; sheet bars and tinplate bars; hot-rolled wide coils, with the exception of production of liquid steel for castings from small and medium-sized foundries;

- (c) hot finished products of iron, ordinary steel or special steel:

rails, sleepers, fishplates, soleplates, joists, heavy sections 80 mm and over, sheet piling, bars and sections of less than 80 mm and flats of less than 150 mm, wire rod, tube rounds and squares, hot-rolled hoop and strip (including tube strip), hot-rolled sheet (coated or uncoated), plates and sheets of 3 mm thickness and over, universal plates of 150 mm and over, with the exception of wire and wire products, bright bars and iron castings;

- (d) cold finished products:

tinplate, terneplate, blackplate, galvanized sheets, other coated sheets, cold-rolled sheets, electrical sheets and strip for tinplate, cold-rolled plate, in coil and in strip;

- (e) tubes:

all seamless steel tubes, welded steel tubes with a diameter of over 406.4 mm;

30. 'synthetic fibres sector' means:

- (a) extrusion/texturisation of all generic types of fibre and yarn based on polyester, polyamide, acrylic or polypropylene, irrespective of their end-uses; or
- (b) polymerisation (including polycondensation) where it is integrated with extrusion in terms of the machinery used; or
- (c) any ancillary process linked to the contemporaneous installation of extrusion/texturisation capacity by the prospective beneficiary or by another company in the group to which it belongs and which, in the specific business activity concerned, is normally integrated with such capacity in terms of the machinery used.

### Article 3

#### Conditions for exemption

1. Aid schemes fulfilling all the conditions of Chapter I of this Regulation, as well as the relevant provisions of Chapter II of this Regulation, shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty provided that any individual aid awarded under such scheme fulfils all the conditions of this Regulation, and the scheme contains an express reference to this Regulation, by citing its title and publication reference in the *Official Journal of the European Union*.

2. Individual aid granted under a scheme referred to in paragraph 1 shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty provided that the aid fulfils all the conditions of Chapter I of this Regulation, as well as the relevant provisions of Chapter II of this Regulation, and that the individual aid measure contains an express reference to the relevant provisions of this Regulation, by citing the relevant provisions, the title of this Regulation and its publication reference in the *Official Journal of the European Union*.

3. Ad hoc aid fulfilling all the conditions of Chapter I of this Regulation, as well as the relevant provisions of Chapter II of this Regulation, shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty provided that the aid contains an express reference to the relevant provisions of this Regulation, by citing the relevant provisions, the title of this Regulation and its publication reference in the *Official Journal of the European Union*.

### Article 4

#### Aid intensity and eligible costs

1. For the purposes of calculating aid intensity, all figures used shall be taken before any deduction of tax or other charge. Where aid is awarded in a form other than a grant, the aid amount shall be the grant equivalent of the aid. Aid payable in several instalments shall be discounted to its value at the moment of granting. The interest rate to be used for discounting purposes shall be the reference rate applicable at the time of grant.

2. In cases where aid is awarded by means of tax exemptions or reductions on future taxes due, subject to the respect of a certain aid intensity defined in gross grant equivalent, discounting of aid tranches shall take place on the basis of the reference rates applicable at the various times the tax advantages become effective.

3. The eligible costs shall be supported by documentary evidence which shall be clear and itemised.

#### Article 5

##### Transparency of aid

1. This Regulation shall apply only to transparent aid.

In particular, the following categories of aid shall be considered to be transparent:

- (a) aid comprised in grants and interest rate subsidies;
- (b) aid comprised in loans, where the gross grant equivalent has been calculated on the basis of the reference rate prevailing at the time of the grant;
- (c) aid comprised in guarantee schemes:
  - (i) where the methodology to calculate the gross grant equivalent has been accepted following notification of this methodology to the Commission in the context of the application of this Regulation or Regulation (EC) No 1628/2006 and the approved methodology explicitly addresses the type of guarantees and the type of underlying transactions at stake; or
  - (ii) where the beneficiary is a small or medium-sized enterprise and the gross grant equivalent has been calculated on the basis of the safe-harbour premiums laid down in the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees;
- (d) aid comprised in fiscal measures, where the measure provides for a cap ensuring that the applicable threshold is not exceeded.

2. The following categories of aid shall not be considered to be transparent:

- (a) aid comprised in capital injections, without prejudice to the specific provisions concerning risk capital;
- (b) aid comprised in risk capital measures, with the exception of aid fulfilling the conditions of Article 29.

3. Aid in the form of repayable advances shall be considered to be transparent aid only if the total amount of the repayable

advance does not exceed the applicable thresholds under this Regulation. If the threshold is expressed in terms of aid intensity, the total amount of the repayable advance, expressed as a percentage of the eligible costs, shall not exceed the applicable aid intensity.

#### Article 6

##### Individual notification thresholds

1. This Regulation shall not apply to any individual aid, whether granted ad hoc or on the basis of a scheme, the gross grant equivalent of which exceeds the following thresholds:

- (a) SME investment and employment aid: EUR 7,5 million per undertaking per investment project;
- (b) investment aid for environmental protection: EUR 7,5 million per undertaking per investment project;
- (c) aid for consultancy in favour of SMEs: EUR 2 million per undertaking per project;
- (d) aid for SME participation in fairs: EUR 2 million per undertaking per project;
- (e) research and development project aid and feasibility studies:
  - (i) if the project is predominantly fundamental research EUR 20 million per undertaking, per project/feasibility study;
  - (ii) if the project is predominantly industrial research, EUR 10 million per undertaking, per project/feasibility study;
  - (iii) for all other projects, EUR 7,5 million per undertaking, per project/feasibility study;
  - (iv) if the project is a EUREKA project twice the amounts laid down in points (i), (ii) and (iii) respectively.
- (f) aid for industrial property rights costs for SMEs: EUR 5 million per undertaking per project;
- (g) training aid: EUR 2 million per training project;
- (h) aid for the recruitment of disadvantaged workers: EUR 5 million per undertaking per year;

- (i) aid for the employment of disabled workers in the form of wage costs: EUR 10 million per undertaking per year;
- (j) aid compensating for additional costs of employing disabled workers: EUR 10 million per undertaking per year.

For the purposes of determining the appropriate threshold applicable to research and development project aid and feasibility studies pursuant to point (e), a project shall be considered to consist 'predominantly' of fundamental research or 'predominantly' of industrial research, if more than 50 % of the eligible project costs are incurred through activities which fall within the category of fundamental research or industrial research respectively. In cases where the predominant character of the project cannot be established, the lower threshold shall apply.

2. Regional investment aid awarded in favour of large investment projects shall be notified to the Commission if the total amount of aid from all sources exceeds 75 % of the maximum amount of aid an investment with eligible costs of EUR 100 million could receive, applying the standard aid threshold in force for large enterprises in the approved regional aid map on the date the aid is to be granted.

#### Article 7

##### Cumulation

1. In determining whether the individual notification thresholds laid down in Article 6 and the maximum aid intensities laid down in Chapter II are respected, the total amount of public support measures for the aided activity or project shall be taken into account, regardless of whether that support is financed from local, regional, national or Community sources.

2. Aid exempted by this Regulation may be cumulated with any other aid exempted under this Regulation as long as those aid measures concern different identifiable eligible costs.

3. Aid exempted by this Regulation shall not be cumulated with any other aid exempted under this Regulation or *de minimis* aid fulfilling the conditions laid down in Commission Regulation (EC) No 1998/2006 <sup>(1)</sup> or with other Community funding in relation to the same — partly or fully overlapping — eligible costs if such cumulation would result in exceeding the highest aid intensity or aid amount applicable to this aid under this Regulation.

4. By way of derogation from paragraph 3, aid in favour of disabled workers, as provided for in Articles 41 and 42, may be cumulated with aid exempted under this Regulation in relation to the same eligible costs above the highest applicable threshold

under this Regulation, provided that such cumulation does not result in an aid intensity exceeding 100 % of the relevant costs over any period for which the workers concerned are employed.

5. As regards the cumulation of aid measures exempted under this Regulation with identifiable eligible costs and aid measures exempted under this Regulation without identifiable eligible costs, the following conditions shall apply:

- (a) where a target undertaking has received capital under a risk capital measure under Article 29 and subsequently applies, during the first three years after the first risk capital investment, for aid within the scope of this Regulation, the relevant aid thresholds or maximum eligible amounts under this Regulation shall be reduced by 50 % in general and by 20 % for target undertakings located in assisted areas; the reduction shall not exceed the total amount of risk capital received; this reduction shall not apply to aid for research, development and innovation exempted under Articles 31 to 37;
- (b) during the first 3 years after being granted, aid for young innovative enterprises may not be cumulated with other aid exempted under this Regulation, with the only exception of aid exempted under Article 29 and aid exempted under Articles 31 to 37.

#### Article 8

##### Incentive effect

1. This Regulation shall exempt only aid which has an incentive effect.

2. Aid granted to SMEs, covered by this Regulation, shall be considered to have an incentive effect if, before work on the project or activity has started, the beneficiary has submitted an application for the aid to the Member State concerned.

3. Aid granted to large enterprises, covered by this Regulation, shall be considered to have an incentive effect if, in addition to fulfilling the condition laid down in paragraph 2, the Member State has verified, before granting the individual aid concerned, that documentation prepared by the beneficiary establishes one or more of the following criteria:

- (a) a material increase in the size of the project/activity due to the aid;
- (b) a material increase in the scope of the project/activity due to the aid;

<sup>(1)</sup> OJ L 379, 28.12.2006, p. 5.

- (c) a material increase in the total amount spent by the beneficiary on the project/activity due to the aid;
- (d) a material increase in the speed of completion of the project/activity concerned;
- (e) as regards regional investment aid referred to in Article 13, that the project would not have been carried out as such in the assisted region concerned in the absence of the aid.

4. The conditions laid down in paragraphs 2 and 3 shall not apply in relation to fiscal measures if the following conditions are fulfilled:

- (a) the fiscal measure establishes a legal right to aid in accordance with objective criteria and without further exercise of discretion by the Member State; and
- (b) the fiscal measure has been adopted before work on the aided project or activity has started; this condition shall not apply in the case of fiscal successor schemes.

5. As regards aid compensating for the additional costs of employing disabled workers, as referred to in Article 42, the conditions laid down in paragraphs 2 and 3 of this Article shall be considered to be met if the conditions laid down in Article 42(3) are fulfilled.

As regards aid for the recruitment of disadvantaged workers in the form of wage subsidies and aid for the employment of disabled workers in the form of wage subsidies, as referred to in Articles 40 and 41, the conditions laid down in paragraphs 2 and 3 of this Article shall be considered to be met if the aid leads to a net increase in the number of disadvantaged/disabled workers employed.

As regards aid in the form of reductions in environmental taxes, as referred to in Article 25, the conditions laid down in paragraphs 2, 3 and 4 of this Article shall be considered to be met.

As regards aid in the form of risk capital, as referred to in Article 29, the conditions laid down in paragraph 2 of this Article shall be considered to be met.

6. If the conditions of paragraphs 2 and 3 are not fulfilled, the entire aid measure shall not be exempted under this Regulation.

#### Article 9

#### Transparency

1. Within 20 working days following the entry into force of an aid scheme or the awarding of an ad hoc aid, which has

been exempted pursuant to this Regulation, the Member State concerned shall forward to the Commission a summary of the information regarding such aid measure. That summary shall be provided in electronic form, via the established Commission IT application and in the form laid down in Annex III.

The Commission shall acknowledge receipt of the summary without delay.

The summaries shall be published by the Commission in the *Official Journal of the European Union* and on the Commission's website.

2. Upon the entry into force of an aid scheme or the awarding of an ad hoc aid, which has been exempted pursuant to this Regulation, the Member State concerned shall publish on the internet the full text of such aid measure. In the case of an aid scheme, this text shall set out the conditions laid down in national law which ensure that the relevant provisions of this Regulation are complied with. The Member State concerned shall ensure that the full text of the aid measure is accessible on the internet as long as the aid measure concerned is in force. The summary information provided by the Member State concerned pursuant to paragraph 1 shall specify an internet address leading directly to the full text of the aid measure.

3. When granting individual aid exempted pursuant to this Regulation, with the exception of aid taking the form of fiscal measures, the act granting the aid shall contain an explicit reference to the specific provisions of Chapter II concerned by that act, to the national law which ensures that the relevant provisions of this Regulation are complied with and to the internet address leading directly to the full text of the aid measure.

4. Without prejudice to the obligations contained in paragraphs 1, 2 and 3, whenever individual aid is granted under an existing aid scheme for research and development projects covered by Article 31 and the individual aid exceeds EUR 3 million and whenever individual regional investment aid is granted, on the basis of an existing aid scheme for large investment projects, which is not individually notifiable pursuant to Article 6, the Member States shall, within 20 working days from the day on which the aid is granted by the competent authority, provide the Commission with the summary information requested in the standard form laid down in Annex II, via the established Commission IT application.

#### Article 10

#### Monitoring

1. The Commission shall regularly monitor aid measures of which it has been informed pursuant to Article 9.



2. Member States shall maintain detailed records regarding any individual aid or aid scheme exempted under this Regulation. Such records shall contain all information necessary to establish that the conditions laid down in this Regulation are fulfilled, including information on the status of any undertaking whose entitlement to aid or a bonus depends on its status as an SME, information on the incentive effect of the aid and information making it possible to establish the precise amount of eligible costs for the purpose of applying this Regulation.

Records regarding individual aid shall be maintained for 10 years from the date on which the aid was granted. Records regarding an aid scheme shall be maintained for 10 years from the date on which the last aid was granted under such scheme.

3. On written request, the Member State concerned shall provide the Commission within a period of 20 working days or such longer period as may be fixed in the request, with all the information which the Commission considers necessary to monitor the application of this Regulation.

Where the Member State concerned does not provide the information requested within the period prescribed by the Commission or within a commonly agreed period, or where the Member State provides incomplete information, the Commission shall send a reminder setting a new deadline for the submission of the information. If, despite such reminder, the Member State concerned does not provide the information requested, the Commission may, after having provided the Member State concerned with the possibility to make its views known, adopt a decision stating that all or part of the future aid measures to which this Regulation applies are to be notified to the Commission in accordance with Article 88(3) of the Treaty.

#### Article 11

##### Annual reporting

In accordance with Chapter III of Commission Regulation (EC) No 794/2004 <sup>(1)</sup>, Member States shall compile a report in electronic form on the application of this Regulation in respect of each whole year or each part of the year during which this Regulation applies. The internet address leading directly to the full text of the aid measures shall also be included in such annual report.

#### Article 12

##### Specific conditions applicable to investment aid

1. In order to be considered an eligible cost for the purposes of this Regulation, an investment shall consist of the following:

- (a) an investment in tangible and/or intangible assets relating to the setting-up of a new establishment, the extension of an

existing establishment, diversification of the output of an establishment into new additional products or a fundamental change in the overall production process of an existing establishment; or

- (b) the acquisition of the capital assets directly linked to an establishment, where the establishment has closed or would have closed had it not been purchased, and the assets are bought by an independent investor; in the case of business succession of a small enterprise in favour of family of the original owner(s) or in favour of former employees, the condition that the assets shall be bought by an independent investor shall be waived.

The sole acquisition of the shares of an undertaking shall not constitute investment.

2. In order to be considered eligible costs for the purposes of this Regulation, intangible assets shall fulfil all the following conditions:

- (a) they must be used exclusively in the undertaking receiving the aid; as regards regional investment aid, they must be used exclusively in the establishment receiving the aid;
- (b) they must be regarded as amortizable assets;
- (c) they must be purchased from third parties under market conditions, without the acquirer being in a position to exercise control, within the meaning of Article 3 of Council Regulation (EC) No 139/2004 <sup>(2)</sup>, on the seller, vice versa; or
- (d) in the case of SME investment aid, they must be included in the assets of the undertaking for at least three years; in the case of regional investment aid, they must be included in the assets of the undertaking and remain in the establishment receiving the aid for at least five years or, in the case of SMEs, at least three years.

3. In order to be considered an eligible cost for the purposes of this Regulation, employment directly created by an investment project shall fulfil all the following conditions:

- (a) employment shall be created within three years of completion of the investment;

<sup>(1)</sup> OJ L 140, 30.4.2004, p. 1.

<sup>(2)</sup> OJ L 24, 29.1.2004, p. 1.

- (b) the investment project shall lead to a net increase in the number of employees in the establishment concerned, compared with the average over the previous 12 months;
- (c) the employment created shall be maintained during a minimum period of five years in the case of large enterprise and a minimum period of three years in case of SMEs.

## CHAPTER II

## SPECIFIC PROVISIONS FOR THE DIFFERENT CATEGORIES OF AID

## SECTION 1

*Regional aid*

## Article 13

**Regional investment and employment aid**

1. Regional investment and employment aid schemes shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in this Article are fulfilled.

Ad hoc aid which is only used to supplement aid granted on the basis of regional investment and employment aid schemes and which does not exceed 50 % of the total aid to be granted for the investment, shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty provided that the ad hoc aid awarded fulfils all the conditions of this Regulation.

2. The aid shall be granted in regions eligible for regional aid, as determined in the approved regional aid map for the Member State concerned for the period 2007-2013. The investment must be maintained in the recipient region for at least five years, or three years in the case of SMEs, after the whole investment has been completed. This shall not prevent the replacement of plant or equipment which has become outdated due to rapid technological change, provided that the economic activity is retained in the region concerned for the minimum period.

3. The aid intensity in present gross grant equivalent shall not exceed the regional aid threshold which is in force at the time the aid is granted in the assisted region concerned.

4. With the exception of aid granted in favour of large investment projects and regional aid for the transport sector,

the thresholds fixed in paragraph 3 may be increased by 20 percentage points for aid awarded to small enterprises and by 10 percentage points for aid awarded to medium-sized enterprises.

5. The thresholds fixed in paragraph 3 shall apply to the intensity of the aid calculated either as a percentage of the investment's eligible tangible and intangible costs or as a percentage of the estimated wage costs of the person hired, calculated over a period of two years, for employment directly created by the investment project or a combination thereof, provided that the aid does not exceed the most favourable amount resulting from the application of either calculation.

6. Where the aid is calculated on the basis of tangible or intangible investment costs, or of acquisition costs in case of takeovers, the beneficiary must provide a financial contribution of at least 25 % of the eligible costs, either through its own resources or by external financing, in a form which is free of any public support. However, where the maximum aid intensity approved under the national regional aid map for the Member State concerned, increased in accordance with paragraph 4, exceeds 75 %, the financial contribution of the beneficiary is reduced accordingly. If the aid is calculated on the basis of tangible or intangible investment costs, the conditions set out in paragraph 7 shall also apply.

7. In the case of acquisition of an establishment, only the costs of buying assets from third parties shall be taken into consideration, provided that the transaction has taken place under market conditions. Where the acquisition is accompanied by other investment, the costs relating to the latter shall be added to the cost of the purchase.

Costs related to the acquisition of assets under lease, other than land and buildings, shall be taken into consideration only if the lease takes the form of financial leasing and contains an obligation to purchase the asset at the expiry of the term of the lease. For the lease of land and buildings, the lease must continue for at least five years after the anticipated date of the completion of the investment project or three years in the case of SMEs.

Except in the case of SMEs and takeovers, the assets acquired shall be new. In the case of takeovers, assets for the acquisition of which aid has already been granted prior to the purchase shall be deducted. For SMEs, the full costs of investments in intangible assets may also be taken into consideration. For large enterprises, such costs are eligible only up to a limit of 50 % of the total eligible investment costs for the project.

8. Where the aid is calculated on the basis of wage costs, the employment shall be directly created by the investment project.

9. By way of derogation from paragraphs 3 and 4, the maximum aid intensities for investments in the processing and marketing of agricultural products may be set at:

- (a) 50 % of eligible investments in regions eligible under Article 87(3)(a) of the Treaty and 40 % of eligible investments in other regions eligible for regional aid, as determined in the regional aid map approved for the Member States concerned for the period 2007-2013, if the beneficiary is an SME;
- (b) 25 % of eligible investments in regions eligible under Article 87(3)(a) of the Treaty and 20 % of eligible investments in other regions eligible for regional aid, as determined in the regional aid map approved for the Member States concerned for the period 2007-2013, if the beneficiary has less than 750 employees and/or less than EUR 200 million turnover, calculated in accordance with Annex I to this Regulation.

10. In order to prevent a large investment being artificially divided into sub-projects, a large investment project shall be considered to be a single investment project when the investment is undertaken within a period of three years by the same undertaking or undertakings and consists of fixed assets combined in an economically indivisible way.

#### Article 14

##### Aid for newly created small enterprises

1. Aid schemes in favour of newly created small enterprises shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2, 3 and 4 of this Article are fulfilled.

2. The beneficiary shall be a small enterprise.

3. The aid amount shall not exceed:

- (a) EUR 2 million for small enterprises with their economic activity in regions eligible for the derogation provided for in Article 87(3)(a) of the Treaty;

- (b) EUR 1 million for small enterprises with their economic activity in regions eligible for the derogation provided for in Article 87(3)(c) of the Treaty.

Annual amounts of aid per undertaking shall not exceed 33 % of the amounts of aid laid down in points (a) and (b).

4. The aid intensity shall not exceed:

- (a) in regions covered by Article 87(3)(a) of the Treaty, 35 % of eligible costs incurred in the first three years after the creation of the undertaking, and 25 % in the two years thereafter;
- (b) in regions covered by Article 87(3)(c) of the Treaty, 25 % of eligible costs incurred in the first three years after the creation of the undertaking, and 15 % in the two years thereafter.

These intensities may be increased by 5 % in regions covered by Article 87(3)(a) of the Treaty with a gross domestic product (GDP) per capita of less than 60 % of the EU-25 average, in regions with a population density of less than 12.5 inhabitants/km<sup>2</sup> and in small islands with a population of less than 5 000 inhabitants, and other communities of the same size suffering from similar isolation.

5. The eligible costs shall be legal, advisory, consultancy and administrative costs directly related to the creation of the small enterprise, as well as the following costs, insofar as they are actually incurred within the first five years after the creation of the undertaking:

- (a) interest on external finance and a dividend on own capital employed not exceeding the reference rate;
- (b) fees for renting production facilities/equipment;
- (c) energy, water, heating, taxes (other than VAT and corporate taxes on business income) and administrative charges;
- (d) depreciation, fees for leasing production facilities/equipment as well as wage costs, provided that the underlying investments or job creation and recruitment measures have not benefited from other aid.

6. Small enterprises controlled by shareholders of undertakings that have closed down in the previous 12 months cannot benefit from aid under this Article if the enterprises concerned are active in the same relevant market or in adjacent markets.

#### SECTION 2

##### **SME investment and employment aid**

###### *Article 15*

##### **SME investment and employment aid**

1. SME investment and employment aid shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2, 3 and 4 of this Article are fulfilled.

2. The aid intensity shall not exceed:

- (a) 20 % of the eligible costs in the case of small enterprises;
- (b) 10 % of the eligible costs in the case of medium-sized enterprises.

3. The eligible costs shall be the following:

- (a) the costs of investment in tangible and intangible assets; or
- (b) the estimated wage costs of employment directly created by the investment project, calculated over a period of two years.

4. Where the investment concerns the processing and marketing of agricultural products, the aid intensity shall not exceed:

- (a) 75 % of eligible investments in the outermost regions;
- (b) 65 % of eligible investments in the smaller Aegean Islands within the meaning of Council Regulation (EC) No 1405/2006 <sup>(1)</sup>;
- (c) 50 % of eligible investments in regions eligible under Article 87(3)(a) of the Treaty;
- (d) 40 % of eligible investments in all other regions.

#### SECTION 3

##### ***Aid for female entrepreneurship***

###### *Article 16*

##### **Aid for small enterprises newly created by female entrepreneurs**

1. Aid schemes in favour of small enterprises newly created by female entrepreneurs shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2 to 5 of this Article are fulfilled.

2. The beneficiaries shall be small enterprises newly created by female entrepreneurs.

3. The aid amount shall not exceed EUR 1 million per undertaking.

Annual amounts of aid per undertaking shall not exceed 33 % of the amounts of aid laid down in the first subparagraph.

4. The aid intensity shall not exceed 15 % of eligible costs incurred in the first five years after the creation of the undertaking.

5. The eligible costs shall be legal, advisory, consultancy and administrative costs directly related to the creation of the small enterprise, as well as the following costs, insofar as they are actually incurred within the first five years of the creation of the undertaking:

- (a) interest on external finance and a dividend on own capital employed not exceeding the reference rate;
- (b) fees for renting production facilities/equipment;
- (c) energy, water, heating, taxes (other than VAT and corporate taxes on business income) and administrative charges;
- (d) depreciation, fees for leasing production facilities/equipment as well as wage costs, provided that the underlying investments or job creation and recruitment measures have not benefited from other aid;
- (e) child care and parent care costs including, where applicable, costs relating to parental leave.

6. Small enterprises controlled by shareholders of undertakings that have closed down in the previous 12 months cannot benefit from aid under this Article if the enterprises concerned are active in the same relevant market or in adjacent markets.

<sup>(1)</sup> OJ L 265, 26.9.2006, p. 1.

## SECTION 4

**Aid for environmental protection**

## Article 17

**Definitions**

For the purposes of this Section, the following definitions shall apply:

1. 'environmental protection' means any action designed to remedy or prevent damage to physical surroundings or natural resources by the beneficiary's own activities, to reduce risk of such damage or to lead to a more efficient use of natural resources, including energy-saving measures and the use of renewable sources of energy;
2. 'energy-saving measures' mean action which enables undertakings to reduce the amount of energy used notably in their production cycle;
3. 'Community standard' means:
  - (a) a mandatory Community standard setting the levels to be attained in environmental terms by individual undertakings; or
  - (b) the obligation under Directive 2008/1/EC of the European Parliament and of the Council <sup>(1)</sup> to use the best available techniques as set out in the most recent relevant information published by the Commission pursuant to Article 17(2) of that Directive;
4. 'renewable energy sources' means the following renewable non-fossil energy sources: wind, solar, geothermal, wave, tidal, hydropower installations, biomass, landfill gas, sewage treatment plant gas and biogases;
5. 'biofuels' means liquid or gaseous fuel for transport produced from biomass;
6. 'sustainable biofuels' means biofuels fulfilling the sustainability criteria set out in Article 15 of the proposal for a Directive of the European Parliament and the Council on the promotion of the use of energy from renewable sources <sup>(2)</sup>; once the Directive has been adopted by the European Parliament and the Council and published in the *Official Journal of the European Union*, the sustainability criteria laid down in the Directive shall apply;
7. 'energy from renewable energy sources' means energy produced by plants using only renewable energy sources, as well as the share in terms of calorific value of energy produced from renewable energy sources in hybrid plants — which also use conventional energy sources; it includes renewable electricity used for filling storage systems, but excludes electricity produced as a result of storage systems;
8. 'cogeneration' means the simultaneous generation in one process of thermal energy and electrical and/or mechanical energy;
9. 'high efficiency cogeneration' means cogeneration meeting the criteria of Annex III to Directive 2004/8/EC of the European Parliament and of the Council <sup>(3)</sup> and satisfying the harmonised efficiency reference values established by Commission Decision 2007/74/EC <sup>(4)</sup>;
10. 'environmental tax' means a tax whose specific tax base has a clear negative effect on the environment or which seeks to tax certain activities, goods or services so that the environmental costs may be included in their price and/or so that producers and consumers are oriented towards activities which better respect the environment;
11. 'Community minimum tax level' means the minimum level of taxation provided for in Community legislation; for energy products and electricity, the Community minimum tax level means the minimum level of taxation laid down in Annex I to Directive 2003/96/EC;
12. 'tangible assets' means investments in land which are strictly necessary in order to meet environmental objectives, investments in buildings, plant and equipment intended to reduce or eliminate pollution and nuisances, and investments to adapt production methods with a view to protecting the environment.

## Article 18

**Investment aid enabling undertakings to go beyond Community standards for environmental protection or increase the level of environmental protection in the absence of Community standards**

1. Investment aid enabling undertakings to go beyond Community standards for environmental protection or increase the level of environmental protection in the absence of Community standards shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2 to 8 of this Article are fulfilled.

<sup>(1)</sup> OJ L 24, 29.1.2008, p. 8.

<sup>(2)</sup> COM(2008) 19 final.

<sup>(3)</sup> OJ L 52, 21.2.2004, p. 50.

<sup>(4)</sup> OJ L 32, 6.2.2007, p. 183.

2. The aided investment shall fulfil one of the following conditions:

- (a) the investment shall enable the beneficiary to increase the level of environmental protection resulting from its activities by going beyond the applicable Community standards, irrespective of the presence of mandatory national standards that are more stringent than the Community standards;
- (b) the investment shall enable the beneficiary to increase the level of environmental protection resulting from its activities in the absence of Community standards.

3. Aid may not be granted where improvements are to ensure that companies comply with Community standards already adopted and not yet in force.

4. The aid intensity shall not exceed 35 % of the eligible costs.

However, the aid intensity may be increased by 20 percentage points for aid awarded to small enterprises and by 10 percentage points for aid awarded to medium-sized enterprises.

5. The eligible costs shall be the extra investment costs necessary to achieve a level of environmental protection higher than the level required by the Community standards concerned, without taking account of operating benefits and operating costs.

6. For the purposes of paragraph 5, the cost of the investment directly related to environmental protection shall be established by reference to the counterfactual situation:

- (a) where the cost of investing in environmental protection can be easily identified in the total investment cost, this precise environmental protection-related cost shall constitute the eligible costs;
- (b) in all other cases, the extra investment costs shall be established by comparing the investment with the counterfactual situation in the absence of State aid; the correct counterfactual shall be the cost of a technically comparable investment that provides a lower degree of environmental protection (corresponding to mandatory Community standards, if they exist) and that would credibly be realised without aid ('reference investment'); technically comparable investment means an investment with the same production capacity and all other technical characteristics (except those directly related to the extra investment for environmental protection); in addition, such a reference investment must, from a business point of view, be a credible alternative to the investment under assessment.

7. The eligible investment shall take the form of investment in tangible assets and/or in intangible assets.

8. In the case of investments aiming at obtaining a level of environmental protection higher than Community standards, the counterfactual shall be chosen as follows:

- (a) where the undertaking is adapting to national standards adopted in the absence of Community standards, the eligible costs shall consist of the additional investment costs necessary to achieve the level of environmental protection required by the national standards;
- (b) where the undertaking adapts to or goes beyond national standards which are more stringent than the relevant Community standards or goes beyond Community standards, the eligible costs shall consist of the additional investment costs necessary to achieve a level of environmental protection higher than the level required by the Community standards. The cost of investments needed to reach the level of protection required by the Community standards shall not be eligible;
- (c) where no standards exist, the eligible costs shall consist of the investment costs necessary to achieve a higher level of environmental protection than that which the undertaking or undertakings in question would achieve in the absence of any environmental aid.

9. Aid for investments relating to the management of waste of other undertakings shall not be exempted under this Article.

#### Article 19

#### **Aid for the acquisition of new transport vehicles which go beyond Community standards or which increase the level of environmental protection in the absence of Community standards**

1. Investment aid for the acquisition of new transport vehicles enabling undertakings active in the transport sector to go beyond Community standards for environmental protection or increase the level of environmental protection in the absence of Community standards shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2, 3 and 4 of this Article are fulfilled.

2. The aided investment shall fulfil the condition laid down in Article 18(2).

3. Aid for the acquisition of new transport vehicles for road, railway, inland waterway and maritime transport complying with adopted Community standards shall be exempted, when such acquisition occurs before these Community standards enter into force and where, once mandatory, they do not apply retroactively to vehicles already purchased.

4. Aid for retrofitting operations of existing transport vehicles with an environmental protection objective shall be exempted if the existing means of transport are upgraded to environmental standards that were not yet in force at the date of entry into operation of those means of transport or if the means of transport are not subject to any environmental standards.

5. The aid intensity shall not exceed 35 % of the eligible costs.

However, the aid intensity may be increased by 20 percentage points for aid awarded to small enterprises and by 10 percentage points for aid awarded to medium-sized enterprises.

6. The eligible costs shall be the extra investment costs necessary to achieve a level of environmental protection higher than the level required by the Community standards.

The eligible costs shall be calculated as set out in Article 18(6) and (7) and without taking account of operating benefits and operating costs.

#### Article 20

##### **Aid for early adaptation to future Community standards for SMEs**

1. Aid allowing SMEs to comply with new Community standards which increase the level of environmental protection and are not yet in force shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2, 3 and 4 of this Article are fulfilled.

2. The Community standards shall have been adopted and the investment shall be implemented and finalised at least one year before the date of entry into force of the standard concerned.

3. The aid intensity shall not exceed 15 % of the eligible costs for small enterprises and 10 % of the eligible costs for medium-sized enterprises if the implementation and finalisation take place more than three years before the date of entry into force of the standard and 10 % for small enterprises if the implementation and finalisation take place between one and three years before the date of entry into force of the standard.

4. The eligible costs shall be the extra investment costs necessary to achieve the level of environmental protection required by the Community standard compared to the existing level of environmental protection required prior to the entry into force of this standard.

The eligible costs shall be calculated as set out in Article 18(6) and (7) and without taking account of operating benefits and operating costs.

#### Article 21

##### **Environmental investment aid for energy saving measures**

1. Environmental investment aid enabling undertakings to achieve energy savings shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that it meets:

(a) the conditions laid down in paragraphs 2 and 3 of this Article; or

(b) the conditions laid down in paragraphs 4 and 5 thereof.

2. The aid intensity shall not exceed 60 % of the eligible costs.

However, the aid intensity may be increased by 20 percentage points for aid awarded to small enterprises and by 10 percentage points for aid awarded to medium-sized enterprises.

3. The eligible costs shall be the extra investment costs necessary to achieve energy savings beyond the level required by the Community standards.

The eligible costs shall be calculated as set out in Article 18(6) and (7).

The eligible costs shall be calculated net of any operating benefits and costs related to the extra investment for energy saving and arising during the first three years of the life of this investment in the case of SMEs, the first four years in the case of large undertakings that are not part of the EU CO<sub>2</sub> Emission Trading System and the first five years in the case of large undertakings that are part of the EU CO<sub>2</sub> Emission Trading System. For large undertakings this period may be reduced to the first three years of the life of this investment where the depreciation time of the investment can be demonstrated not to exceed three years.

The eligible cost calculations shall be certified by an external auditor.

4. The aid intensity shall not exceed 20 % of the eligible costs.

However, the aid intensity may be increased by 20 percentage points for aid awarded to small enterprises and by 10 percentage points for aid awarded to medium-sized enterprises.

5. The eligible costs shall be calculated as set out in Article 18(6) and (7) and without taking account of operating benefits and operating costs.

#### Article 22

##### **Environmental investment aid for high-efficiency cogeneration**

1. Environmental investment aid for high-efficiency cogeneration shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2, 3 and 4 of this Article are fulfilled.

2. The aid intensity shall not exceed 45 % of the eligible costs.

However, the aid intensity may be increased by 20 percentage points for aid awarded to small enterprises and by 10 percentage points for aid awarded to medium-sized enterprises.

3. The eligible costs shall be the extra investment costs necessary to realise a high efficiency cogeneration plant as compared to the reference investment. The eligible costs shall be calculated as set out in Article 18(6) and (7) and without taking account of operating benefits and operating costs.

4. A new cogeneration unit shall overall make primary energy savings compared to separate production as provided for by Directive 2004/8/EC and Decision 2007/74/EC. The improvement of an existing cogeneration unit or conversion of an existing power generation unit into a cogeneration unit shall result in primary energy savings compared to the original situation.

#### Article 23

##### **Environmental investment aid for the promotion of energy from renewable energy sources**

1. Environmental investment aid for the promotion of energy from renewable energy sources shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2, 3 and 4 of this Article are fulfilled.

2. The aid intensity shall not exceed 45 % of the eligible costs.

However, the aid intensity may be increased by 20 percentage points for aid awarded to small enterprises and by 10 percentage points for aid awarded to medium-sized enterprises.

3. The eligible costs shall be the extra costs borne by the beneficiary compared with a conventional power plant or with a conventional heating system with the same capacity in terms of the effective production of energy.

The eligible costs shall be calculated as set out in Article 18(6) and (7) and without taking account of operating benefits and operating costs.

4. Environmental investment aid for the production of biofuels shall be exempted only to the extent the aided investments are used exclusively for the production of sustainable biofuels.

#### Article 24

##### **Aid for environmental studies**

1. Aid for studies directly linked to investments referred to in Article 18, investments in energy saving measures under the conditions set out in Article 21 and investments for the promotion of energy from renewable energy sources under the conditions set out in Article 23 shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty provided that the conditions laid down in paragraphs 2 and 3 of this Article are fulfilled.

2. The aid intensity shall not exceed 50 % of the eligible costs.

However, the aid intensity may be increased by 20 percentage points for studies undertaken on behalf of small enterprises and by 10 percentage points for studies undertaken on behalf of medium-sized enterprises.

3. The eligible costs shall be the costs of the study.

#### Article 25

##### **Aid in the form of reductions in environmental taxes**

1. Environmental aid schemes in the form of reductions in environmental taxes fulfilling the conditions of Directive 2003/96/EC shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided the conditions laid down in paragraphs 2 and 3 of this Article are fulfilled.

2. The beneficiaries of the tax reduction shall pay at least the Community minimum tax level set by Directive 2003/96/EC.



3. Tax reductions shall be granted for maximum periods of ten years. After such 10 year period, Member States shall re-evaluate the appropriateness of the aid measures concerned.

#### SECTION 5

### ***Aid for consultancy in favour of SMEs and SME participation in fairs***

#### *Article 26*

#### **Aid for consultancy in favour of SMEs**

1. Aid for consultancy in favour of SMEs shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2 and 3 of this Article are fulfilled.

2. The aid intensity shall not exceed 50 % of the eligible costs.

3. The eligible costs shall be the consultancy costs of services provided by outside consultants.

The services concerned shall not be a continuous or periodic activity nor relate to the undertaking's usual operating costs, such as routine tax consultancy services, regular legal services or advertising.

#### *Article 27*

#### **Aid for SME participation in fairs**

1. Aid to SMEs for participation in fairs shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty provided the conditions laid down in paragraphs 2 and 3 of this Article are fulfilled.

2. The aid intensity shall not exceed 50 % of the eligible costs.

3. The eligible costs shall be the costs incurred for renting, setting up and running the stand for the first participation of an undertaking in any particular fair or exhibition.

#### SECTION 6

### ***Aid in the form of risk capital***

#### *Article 28*

#### **Definitions**

For the purposes of this Section, the following definitions shall apply:

1. 'equity' means ownership interest in an undertaking, represented by the shares issued to investors;

2. 'quasi-equity' means financial instruments whose return for the holder is predominantly based on the profits or losses of the underlying target undertaking and which are unsecured in the event of default;

3. 'private equity' means private — as opposed to public — equity or quasi-equity investment in undertakings not listed on a stock-market, including venture capital;

4. 'seed capital' means financing provided to study, assess and develop an initial concept, preceding the start-up phase;

5. 'start-up capital' means financing provided to undertakings, which have not sold their product or service commercially and are not yet generating a profit for product development and initial marketing;

6. 'expansion capital' means financing provided for the growth and expansion of an undertaking, which may or may not break even or trade profitably, for the purposes of increasing production capacity, market or product development or the provision of additional working capital;

7. 'exit strategy' means a strategy for the liquidation of holdings by a venture capital or private equity fund in accordance with a plan to achieve maximum return, including trade sale, write-offs, repayment of preference shares/loans, sale to another venture capitalist, sale to a financial institution and sale by public offering, including Initial Public Offerings;

8. 'target undertaking' means an undertaking in which an investor or investment fund is considering investing.

#### *Article 29*

#### **Aid in the form of risk capital**

1. Risk capital aid schemes in favour of SMEs shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided the conditions laid down in paragraphs 2 to 8 of this Article are fulfilled.

2. The risk capital measure shall take the form of participation into a profit driven private equity investment fund, managed on a commercial basis.

3. The tranches of investment to be made by the investment fund shall not exceed EUR 1,5 million per target undertaking over any period of twelve months.

4. For SMEs located in assisted areas, as well as for small enterprises located in non-assisted areas, the risk capital measure shall be restricted to providing seed capital, start-up capital and/or expansion capital. For medium-sized enterprises located in non-assisted areas, the risk capital measure shall be restricted to providing seed capital and/or start-up capital, to the exclusion of expansion capital.

5. The investment fund shall provide at least 70 % of its total budget invested into target SMEs in the form of equity or quasi-equity.

6. At least 50 % of the funding of the investment funds shall be provided by private investors. In the case of investment funds targeting exclusively SMEs located in assisted areas, at least 30 % of the funding shall be provided by private investors.

7. To ensure that the risk capital measure is profit-driven, the following conditions shall be fulfilled:

(a) a business plan shall exist for each investment, containing details of product, sales and profitability development and establishing the *ex ante* viability of the project; and

(b) a clear and realistic exit strategy shall exist for each investment.

8. To ensure that the investment fund is managed on a commercial basis, the following conditions shall be fulfilled:

(a) there shall be an agreement between a professional fund manager and participants in the fund, providing that the manager's remuneration is linked to performance and setting out the objectives of the fund and proposed timing of investments; and

(b) private investors shall be represented in decision-making, such as through an investors' or advisory committee; and

(c) best practices and regulatory supervision shall apply to the management of funds.

## SECTION 7

### **Aid for research and development and innovation**

#### Article 30

#### **Definitions**

For the purposes of this Section, the following definitions shall apply:

1. 'research organisation' means an entity, such as a university or research institute, irrespective of its legal status (organised under public or private law) or way of financing, whose

primary goal is to conduct fundamental research, industrial research or experimental development and to disseminate their results by way of teaching, publication or technology transfer; all profits must be reinvested in these activities, the dissemination of their results or teaching; undertakings that can exert influence upon such an organisation, for instance in their capacity as shareholders or members of the organisation, shall enjoy no preferential access to the research capacities of such an organisation or to the research results generated by it;

2. 'fundamental research' means experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundations of phenomena and observable facts, without any direct practical application or use in view;

3. 'industrial research' means the planned research or critical investigation aimed at the acquisition of new knowledge and skills for developing new products, processes or services or for bringing about a significant improvement in existing products, processes or services. It comprises the creation of components parts to complex systems, which is necessary for the industrial research, notably for generic technology validation, to the exclusion of prototypes;

4. 'experimental development' means the acquiring, combining, shaping and using existing scientific, technological, business and other relevant knowledge and skills for the purpose of producing plans and arrangements or designs for new, altered or improved products, processes or services. These may also include, for instance, other activities aiming at the conceptual definition, planning and documentation of new products, processes or services. Those activities may comprise producing drafts, drawings, plans and other documentation, provided that they are not intended for commercial use;

The development of commercially usable prototypes and pilot projects is also included where the prototype is necessarily the final commercial product and where it is too expensive to produce for it to be used only for demonstration and validation purposes. In case of a subsequent commercial use of demonstration or pilot projects, any revenue generated from such use must be deducted from the eligible costs.

The experimental production and testing of products, processes and services shall also be eligible, provided that these cannot be used or transformed to be used in industrial applications or commercially.

Experimental development shall not include routine or periodic changes made to products, production lines, manufacturing processes, existing services and other operations in progress, even if such changes may represent improvements;

5. 'highly qualified personnel' means researchers, engineers, designers and marketing managers with tertiary education degree and at least 5 years of relevant professional experience; doctoral training may count as relevant professional experience;
6. 'secondment' means temporary employment of personnel by a beneficiary during a period of time, after which the personnel has the right to return to its previous employer.

#### Article 31

##### Aid for research and development projects

1. Aid for research and development projects shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty provided that the conditions laid down in paragraphs 2 to 5 of this Article are fulfilled.

2. The aided part of the research and development project shall completely fall within one or more of the following research categories:

- (a) fundamental research;
- (b) industrial research;
- (c) experimental development.

When a project encompasses different tasks, each task shall be qualified as falling under one of the categories listed in the first subparagraph or as not falling under any of those categories.

3. The aid intensity shall not exceed:
  - (a) 100 % of the eligible costs for fundamental research;
  - (b) 50 % of the eligible costs for industrial research;
  - (c) 25 % of the eligible costs for experimental development.

The aid intensity shall be established for each beneficiary of aid, including in a collaboration project, as provided in paragraph 4(b)(i).

In the case of aid for a research and development project being carried out in collaboration between research organisations and undertakings, the combined aid deriving from direct government support for a specific project and, where they constitute aid, contributions from research organisations to that project may not exceed the applicable aid intensities for each beneficiary undertaking.

4. The aid intensities set for industrial research and experimental development in paragraph 3 may be increased as follows:

- (a) where the aid is granted to SMEs, the aid intensity may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises; and
- (b) a bonus of 15 percentage points may be added, up to a maximum aid intensity of 80 % of the eligible costs, if:
  - (i) the project involves effective collaboration between at least two undertakings which are independent of each other and the following conditions are fulfilled:
    - no single undertaking bears more than 70 % of the eligible costs of the collaboration project,
    - the project involves collaboration with at least one SME or is carried out in at least two different Member States, or
  - (ii) the project involves effective collaboration between an undertaking and a research organisation and the following conditions are fulfilled:
    - the research organisation bears at least 10 % of the eligible project costs, and
    - the research organisation has the right to publish the results of the research projects insofar as they stem from research carried out by that organisation, or
  - (iii) in the case of industrial research, the results of the project are widely disseminated through technical and scientific conferences or through publication in scientific or technical journals or in open access repositories (databases where raw research data can be accessed by anyone), or through free or open source software.

For the purposes of point (b)(i) and (ii) of the first subparagraph, subcontracting shall not be considered to be effective collaboration.

5. The eligible costs shall be the following:

- (a) personnel costs (researchers, technicians and other supporting staff to the extent employed on the research project);
- (b) costs of instruments and equipment to the extent and for the period used for the research project; if such instruments and equipment are not used for their full life for the research project, only the depreciation costs corresponding to the life of the research project, as calculated on the basis of good accounting practice, shall be considered eligible;
- (c) costs for buildings and land, to the extent and for the duration used for the research project; with regard to buildings, only the depreciation costs corresponding to the life of the research project, as calculated on the basis of good accounting practice shall be considered eligible; for land, costs of commercial transfer or actually incurred capital costs shall be eligible;
- (d) cost of contractual research, technical knowledge and patents bought or licensed from outside sources at market prices, where the transaction has been carried out at arm's length and there is no element of collusion involved, as well as costs of consultancy and equivalent services used exclusively for the research activity;
- (e) additional overheads incurred directly as a result of the research project;
- (f) other operating costs, including costs of materials, supplies and similar products incurred directly as a result of the research activity.

6. All eligible costs shall be allocated to a specific category of research and development.

#### Article 32

##### **Aid for technical feasibility studies**

1. Aid for technical feasibility studies preparatory to industrial research or experimental development activities shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2 and 3 of this Article are fulfilled.

2. The aid intensity shall not exceed:

- (a) for SMEs, 75 % of the eligible costs for studies preparatory to industrial research activities and 50 % of the eligible costs for studies preparatory to experimental development activities;

- (b) for large enterprises, 65 % of the eligible costs for studies preparatory to industrial research activities and 40 % of the eligible costs for studies preparatory to experimental development activities.

3. The eligible costs shall be the costs of the study.

#### Article 33

##### **Aid for industrial property rights costs for SMEs**

1. Aid to SMEs for the costs associated with obtaining and validating patents and other industrial property rights shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided the conditions laid down in paragraphs 2 and 3 of this Article are fulfilled.

2. The aid intensity shall not exceed the intensity for research and development project aid laid down in Article 31(3) and (4), in respect of the research activities which first led to the industrial property rights concerned.

3. The eligible costs shall be the following:

- (a) all costs preceding the grant of the right in the first jurisdiction, including costs relating to the preparation, filing and prosecution of the application as well as costs incurred in renewing the application before the right has been granted;
- (b) translation and other costs incurred in order to obtain the granting or validation of the right in other legal jurisdictions;
- (c) costs incurred in defending the validity of the right during the official prosecution of the application and possible opposition proceedings, even if such costs occur after the right is granted.

#### Article 34

##### **Aid for research and development in the agricultural and fisheries sectors**

1. Aid for research and development concerning products listed in Annex I to the Treaty shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2 to 7 of this Article are fulfilled.

2. The aid shall be of interest to all operators in the particular sector or sub-sector concerned.

3. Information that research will be carried out, and with which goal, shall be published on the internet, prior to the commencement of the research. An approximate date of expected results and their place of publication on the internet, as well as a mention that the result will be available at no cost, must be included.

The results of the research shall be made available on internet, for a period of at least 5 years. They shall be published no later than any information which may be given to members of any particular organisation.

4. Aid shall be granted directly to the research organisation and must not involve the direct granting of non-research related aid to a company producing, processing or marketing agricultural products, nor provide price support to producers of such products.

5. The aid intensity shall not exceed 100 % of the eligible costs.

6. The eligible costs shall be those provided in Article 31(5).

7. Aid for research and development concerning products listed in Annex I to the Treaty and not fulfilling the conditions laid down in this Article shall be compatible with the common market within the meaning of Article 87(3)(c) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided the conditions laid down in Articles 30, 31 and 32 of this Regulation are fulfilled.

#### Article 35

##### **Aid to young innovative enterprises**

1. Aid to young innovative enterprises shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2 to 5 of this Article are fulfilled.

2. The beneficiary shall be a small enterprise that has been in existence for less than 6 years at the time when the aid is granted.

3. The research and development costs of the beneficiary shall represent at least 15 % of its total operating costs in at least one of the three years preceding the granting of the aid or, in the case of a start-up enterprise without any financial history, in the audit of its current fiscal period, as certified by an external auditor.

4. The aid amount shall not exceed EUR 1 million.

However, the aid amount shall not exceed EUR 1,5 million in regions eligible for the derogation provided for in

Article 87(3)(a) of the Treaty, and EUR 1,25 million in regions eligible for the derogation provided for in Article 87(3)(c) of the Treaty.

5. The beneficiary may receive the aid only once during the period in which it qualifies as a young innovative enterprise.

#### Article 36

##### **Aid for innovation advisory services and for innovation support services**

1. Aid for innovation advisory services and for innovation support services shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2 to 6 of this Article are fulfilled.

2. The beneficiary shall be an SME.

3. The aid amount shall not exceed a maximum of EUR 200 000 per beneficiary within any three year period.

4. The service provider shall benefit from a national or European certification. If the service provider does not benefit from a national or European certification, the aid intensity shall not exceed 75 % of the eligible costs.

5. The beneficiary must use the aid to buy the services at market price, or if the service provider is a non-for-profit entity, at a price which reflects its full costs plus a reasonable margin.

6. The eligible costs shall be the following:

(a) as regards innovation advisory services, the costs relating to: management consulting, technological assistance, technology transfer services, training, consultancy for acquisition, protection and trade in Intellectual Property Rights and for licensing agreements, consultancy on the use of standards;

(b) as regards innovation support services, the costs relating to: office space, data banks, technical libraries, market research, use of laboratory, quality labelling, testing and certification.

#### Article 37

##### **Aid for the loan of highly qualified personnel**

1. Aid for the loan of highly qualified personnel seconded from a research organisation or a large enterprise to an SME shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2 to 5 of this Article are fulfilled.

2. The seconded personnel must not be replacing other personnel, but must be employed in a newly created function within the beneficiary undertaking and must have been employed for at least two years in the research organisation or the large enterprise, which is sending the personnel on secondment.

The seconded personnel must work on research and development and innovation activities within the SME receiving the aid.

3. The aid intensity shall not exceed 50 % of the eligible costs, for a maximum of 3 years per undertaking and per person borrowed.

4. The eligible costs shall be all personnel costs for borrowing and employing highly qualified personnel, including the costs of using a recruitment agency and of paying a mobility allowance for the seconded personnel.

5. This Article shall not apply to consultancy costs as referred to in Article 26.

#### SECTION 8

### **Training aid**

#### Article 38

#### **Definitions**

For the purposes of this Section, the following definitions shall apply:

1. 'specific training' means training involving tuition directly and principally applicable to the employee's present or future position in the undertaking and providing qualifications which are not or only to a limited extent transferable to other undertakings or fields of work;

2. 'general training' means training involving tuition which is not applicable only or principally to the employee's present or future position in the undertaking, but which provides qualifications that are largely transferable to other undertakings or fields of work. Training shall be considered 'general' if, for example:

(a) it is jointly organised by different independent undertakings or where employees of different undertakings may avail themselves of the training;

(b) it is recognised, certified or validated by public authorities or bodies or by other bodies or institutions on which a Member State or the Community has conferred the necessary powers.

#### Article 39

### **Training aid**

1. Training aid shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2, 3 and 4 of this Article are fulfilled.

2. The aid intensity shall not exceed:

(a) 25 % of the eligible costs for specific training; and

(b) 60 % of the eligible costs for general training.

However, the aid intensity may be increased, up to a maximum aid intensity of 80 % of the eligible costs, as follows:

(a) by 10 percentage points if the training is given to disabled or disadvantaged workers;

(b) by 10 percentage points if the aid is awarded to medium-sized enterprises and by 20 percentage points if the aid is awarded to small enterprises.

Where the aid is granted in the maritime transport sector, it may reach an intensity of 100 % of the eligible costs, whether the training project concerns specific or general training, provided that the following conditions are met:

(a) the trainee shall not be an active member of the crew but shall be supernumerary on board; and

(b) the training shall be carried out on board ships entered on Community registers.

3. In cases where the aid project involves both specific and general training components which cannot be separated for the calculation of the aid intensity, and in cases where the specific or general character of the training aid project cannot be established, the aid intensities applicable to specific training shall apply.

4. The eligible costs of a training aid project shall be:

(a) trainers' personnel costs;

(b) trainers' and trainees' travel expenses, including accommodation;

(c) other current expenses such as materials and supplies directly related to the project;

(d) depreciation of tools and equipment, to the extent that they are used exclusively for the training project;

- (e) cost of guidance and counselling services with regard to the training project;
- (f) trainees' personnel costs and general indirect costs (administrative costs, rent, overheads) up to the amount of the total of the other eligible costs referred to in points (a) to (e). As regards the trainees' personnel costs, only the hours during which the trainees actually participate in the training, after deduction of any productive hours, may be taken into account.

## SECTION 9

***Aid for disadvantaged and disabled workers****Article 40***Aid for the recruitment of disadvantaged workers in the form of wage subsidies**

1. Aid schemes for the recruitment of disadvantaged workers in the form of wage subsidies shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided the conditions laid down in paragraphs 2 to 5 of this Article are fulfilled.
2. The aid intensity shall not exceed 50 % of the eligible costs.
3. Eligible costs shall be the wage costs over a maximum period of 12 months following recruitment.

However, where the worker concerned is a severely disadvantaged worker, eligible costs shall be the wage costs over a maximum period of 24 months following recruitment.

4. Where the recruitment does not represent a net increase, compared with the average over the previous twelve months, in the number of employees in the undertaking concerned, the post or posts shall have fallen vacant following voluntary departure, disability, retirement on grounds of age, voluntary reduction of working time or lawful dismissal for misconduct and not as a result of redundancy.
5. Except in the case of lawful dismissal for misconduct, the disadvantaged worker shall be entitled to continuous employment for a minimum period consistent with the national legislation concerned or any collective agreements governing employment contracts.

If the period of employment is shorter than 12 months or, as the case may be 24 months, the aid shall be reduced pro rata accordingly.

*Article 41***Aid for the employment of disabled workers in the form of wage subsidies**

1. Aid for the employment of disabled workers in the form of wage subsidies shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided the conditions laid down in paragraphs 2 to 5 of this Article are fulfilled.
2. The aid intensity shall not exceed 75 % of the eligible costs.
3. Eligible costs shall be the wage costs over any given period during which the disabled worker is being employed.
4. Where the recruitment does not represent a net increase, compared with the average over the previous twelve months, in the number of employees in the undertaking concerned, the post or posts shall have fallen vacant following voluntary departure, disability, retirement on grounds of age, voluntary reduction of working time or lawful dismissal for misconduct and not as a result of redundancy.

5. Except in the case of lawful dismissal for misconduct the workers shall be entitled to continuous employment for a minimum period consistent with the national legislation concerned or any collective agreements governing employment contracts.

If the period of employment is shorter than 12 months, the aid shall be reduced pro rata accordingly.

*Article 42***Aid for compensating the additional costs of employing disabled workers**

1. Aid for compensating the additional costs of employing disabled workers shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided the conditions laid down in paragraphs 2 and 3 of this Article are fulfilled.
2. The aid intensity shall not exceed 100 % of the eligible costs.
3. Eligible costs shall be costs other than wage costs covered by Article 41, which are additional to those which the undertaking would have incurred if employing workers who are not disabled, over the period during which the worker concerned is being employed.

The eligible costs shall be the following:

- (a) costs of adapting premises;
- (b) costs of employing staff for time spent solely on the assistance of the disabled workers;
- (c) costs of adapting or acquiring equipment, or acquiring and validating software for use by disabled workers, including adapted or assistive technology facilities, which are additional to those which the beneficiary would have incurred if employing workers who are not disabled;
- (d) where the beneficiary provides sheltered employment, the costs of constructing, installing or expanding the establishment concerned, and any costs of administration and transport which result directly from the employment of disabled workers.

#### CHAPTER III

#### FINAL PROVISIONS

##### Article 43

##### Repeal

Regulation (EC) No 1628/2006 shall be repealed.

Any references to the repealed Regulation and to Regulation (EC) No 68/2001, Regulation (EC) No 70/2001 and Regulation (EC) No 2204/2002 shall be construed as references to this Regulation.

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

Done at Brussels, 6 August 2008.

#### Article 44

##### Transitional provisions

1. This Regulation shall apply to individual aid granted before its entry into force, if the aid fulfils all the conditions laid down in this Regulation, with the exception of Article 9.

2. Any aid granted before 31 December 2008, which does not fulfil the conditions laid down in this Regulation but fulfils the conditions laid down in Regulation (EC) No 68/2001, Regulation (EC) No 70/2001, Regulation (EC) No 2204/2002 or Regulation (EC) No 1628/2006 shall be compatible with the common market and exempt from the notification requirement of Article 88(3) of the Treaty.

Any other aid granted before the entry into force of this Regulation, which fulfils neither the conditions laid down in this Regulation nor the conditions laid down in one of the Regulations referred to in the first subparagraph, shall be assessed by the Commission in accordance with the relevant frameworks, guidelines, communications and notices.

3. At the end of the period of validity of this Regulation, any aid schemes exempted under this Regulation shall remain exempted during an adjustment period of six months, with the exception of regional aid schemes. The exemption of regional aid schemes shall expire at the date of expiry of the approved regional aid maps.

#### Article 45

##### Entry into force and applicability

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

It shall apply until 31 December 2013.

For the Commission

Neelie KROES

Member of the Commission



## ANNEX I

**Definition of SME***Article 1***Enterprise**

An enterprise is considered to be any entity engaged in an economic activity, irrespective of its legal form. This includes, in particular, self-employed persons and family businesses engaged in craft or other activities, and partnerships or associations regularly engaged in an economic activity.

*Article 2***Staff headcount and financial thresholds determining enterprise categories**

1. The category of micro, small and medium-sized enterprises ("SMEs") is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.

2. Within the SME category, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million.

3. Within the SME category, a micro-enterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.

*Article 3***Types of enterprise taken into consideration in calculating staff numbers and financial amounts**

1. An 'autonomous enterprise' is any enterprise which is not classified as a partner enterprise within the meaning of paragraph 2 or as a linked enterprise within the meaning of paragraph 3.

2. 'Partner enterprises' are all enterprises which are not classified as linked enterprises within the meaning of paragraph 3 and between which there is the following relationship: an enterprise (upstream enterprise) holds, either solely or jointly with one or more linked enterprises within the meaning of paragraph 3, 25 % or more of the capital or voting rights of another enterprise (downstream enterprise).

However, an enterprise may be ranked as autonomous, and thus as not having any partner enterprises, even if this 25 % threshold is reached or exceeded by the following investors, provided that those investors are not linked, within the meaning of paragraph 3, either individually or jointly to the enterprise in question:

(a) public investment corporations, venture capital companies, individuals or groups of individuals with a regular venture capital investment activity who invest equity capital in unquoted businesses (business angels), provided the total investment of those business angels in the same enterprise is less than EUR 1 250 000;

(b) universities or non-profit research centres;

(c) institutional investors, including regional development funds;

(d) autonomous local authorities with an annual budget of less than EUR 10 million and less than 5 000 inhabitants.

3. 'Linked enterprises' are enterprises which have any of the following relationships with each other:

(a) an enterprise has a majority of the shareholders' or members' voting rights in another enterprise;

(b) an enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise;

(c) an enterprise has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or to a provision in its memorandum or articles of association;

(d) an enterprise, which is a shareholder in or member of another enterprise, controls alone, pursuant to an agreement with other shareholders in or members of that enterprise, a majority of shareholders' or members' voting rights in that enterprise.

There is a presumption that no dominant influence exists if the investors listed in the second subparagraph of paragraph 2 are not involving themselves directly or indirectly in the management of the enterprise in question, without prejudice to their rights as shareholders.

Enterprises having any of the relationships described in the first subparagraph through one or more other enterprises, or any one of the investors mentioned in paragraph 2, are also considered to be linked.

Enterprises which have one or other of such relationships through a natural person or group of natural persons acting jointly are also considered linked enterprises if they engage in their activity or in part of their activity in the same relevant market or in adjacent markets.

An 'adjacent market' is considered to be the market for a product or service situated directly upstream or downstream of the relevant market.

4. Except in the cases set out in paragraph 2, second subparagraph, an enterprise cannot be considered an SME if 25 % or more of the capital or voting rights are directly or indirectly controlled, jointly or individually, by one or more public bodies.

5. Enterprises may make a declaration of status as an autonomous enterprise, partner enterprise or linked enterprise, including the data regarding the thresholds set out in Article 2. The declaration may be made even if the capital is spread in such a way that it is not possible to determine exactly by whom it is held, in which case the enterprise may declare in good faith that it can legitimately presume that it is not owned as to 25 % or more by one enterprise or jointly by enterprises linked to one another. Such declarations are made without prejudice to the checks and investigations provided for by national or Community rules.

#### Article 4

##### **Data used for the staff headcount and the financial amounts and reference period**

1. The data to apply to the headcount of staff and the financial amounts are those relating to the latest approved accounting period and calculated on an annual basis. They are taken into account from the date of closure of the accounts. The amount selected for the turnover is calculated excluding value added tax (VAT) and other indirect taxes.

2. Where, at the date of closure of the accounts, an enterprise finds that, on an annual basis, it has exceeded or fallen below the headcount or financial thresholds stated in Article 2, this will not result in the loss or acquisition of the status of medium-sized, small or micro-enterprise unless those thresholds are exceeded over two consecutive accounting periods.

3. In the case of newly-established enterprises whose accounts have not yet been approved, the data to apply is to be derived from a bona fide estimate made in the course of the financial year.

#### Article 5

##### **Staff headcount**

The headcount corresponds to the number of annual work units (AWU), i.e. the number of persons who worked full-time within the enterprise in question or on its behalf during the entire reference year under consideration. The work of persons who have not worked the full year, the work of those who have worked part-time, regardless of duration, and the work of seasonal workers are counted as fractions of AWU. The staff consists of:

- (a) employees;
- (b) persons working for the enterprise being subordinated to it and deemed to be employees under national law;
- (c) owner-managers;
- (d) partners engaging in a regular activity in the enterprise and benefiting from financial advantages from the enterprise.

Apprentices or students engaged in vocational training with an apprenticeship or vocational training contract are not included as staff. The duration of maternity or parental leaves is not counted.

*Article 6***Establishing the data of an enterprise**

1. In the case of an autonomous enterprise, the data, including the number of staff, are determined exclusively on the basis of the accounts of that enterprise.

2. The data, including the headcount, of an enterprise having partner enterprises or linked enterprises are determined on the basis of the accounts and other data of the enterprise or, where they exist, the consolidated accounts of the enterprise, or the consolidated accounts in which the enterprise is included through consolidation.

To the data referred to in the first subparagraph are added the data of any partner enterprise of the enterprise in question situated immediately upstream or downstream from it. Aggregation is proportional to the percentage interest in the capital or voting rights (whichever is greater). In the case of cross-holdings, the greater percentage applies.

To the data referred to in the first and second subparagraph are added 100 % of the data of any enterprise, which is linked directly or indirectly to the enterprise in question, where the data were not already included through consolidation in the accounts.

3. For the application of paragraph 2, the data of the partner enterprises of the enterprise in question are derived from their accounts and their other data, consolidated if they exist. To these are added 100 % of the data of enterprises which are linked to these partner enterprises, unless their accounts data are already included through consolidation.

For the application of the same paragraph 2, the data of the enterprises which are linked to the enterprise in question are to be derived from their accounts and their other data, consolidated if they exist. To these are added, pro rata, the data of any possible partner enterprise of that linked enterprise, situated immediately upstream or downstream from it, unless it has already been included in the consolidated accounts with a percentage at least proportional to the percentage identified under the second subparagraph of paragraph 2.

4. Where in the consolidated accounts no staff data appear for a given enterprise, staff figures are calculated by aggregating proportionally the data from its partner enterprises and by adding the data from the enterprises to which the enterprise in question is linked.

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## ANNEX II

**Form for the provision of summary information for research and development aid under the extended reporting obligation laid down in Article 9(4)**

1. Aid in favour of (name of the undertaking(s) receiving the aid, SME or not):
2. Aid scheme reference (Commission reference of the existing scheme or schemes under which the aid is awarded):
3. Public entity/entities providing the assistance (name and co-ordinates of the granting authority or authorities):
4. Member State where the aided project or measure is carried out:
5. Type of project or measure:
6. Short description of project or measure:
7. Where applicable, eligible costs (in EUR):
8. Discounted aid amount (gross) in EUR:
9. Aid intensity (% in gross grant equivalent):
10. Conditions attached to the payment of the proposed aid (if any):
11. Planned start and end date of the project or measure:
12. Date of award of the aid:

**Form for the provision of summary information for aid for large investment projects under the extended reporting obligation laid down in Article 9(4)**

1. Aid in favour of (name of the undertaking(s) receiving the aid).
2. Aid scheme reference (Commission reference of the existing scheme or schemes under which the aid is awarded).
3. Public entity/entities providing the assistance (name and co-ordinates of the granting authority or authorities).
4. Member State where the investment takes place.
5. Region (NUTS 3 level) where the investment takes place.
6. Municipality (previously NUTS 5 level, now LAU 2) where the investment takes place.
7. Type of project (setting-up of a new establishment, extension of existing establishment, diversification of the output of an establishment into new additional products or a fundamental change in the overall production process of an existing establishment).
8. Products manufactured or services provided on the basis of the investment project (with PRODCOM/NACE nomenclature or CPA nomenclature for projects in the service sectors).

9. Short description of investment project.
  10. Discounted eligible cost of investment project (in EUR).
  11. Discounted aid amount (gross) in EUR.
  12. Aid intensity (% in GGE).
  13. Conditions attached to the payment of the proposed assistance (if any).
  14. Planned start and end date of the project.
  15. Date of award of the aid.
-

## ANNEX III

**Form for the provision of summary information under the reporting obligation laid down in Article 9(1)**

Please fill in the information required below:

## PART I

Aid reference	<i>(to be completed by the Commission)</i>	
Member State		
Member State reference number		
Region	Name of the Region (NUTS) <sup>(1)</sup>	Regional aid status <sup>(2)</sup>
Granting authority	Name	
	Address	
	Webpage	
Title of the aid measure		
National legal basis (Reference to the relevant national official publication)		
Web link to the full text of the aid measure		
Type of measure	Scheme	
	Ad hoc aid	Name of the Beneficiary
Amendment of an existing aid measure		Commission aid number
	Prolongation	
	Modification	
Duration <sup>(3)</sup>	Scheme	dd/mm/yy to dd/mm/yy
Date of granting <sup>(4)</sup>	Ad hoc aid	dd/mm/yy
Economic sector(s) concerned	All economic sectors eligible to receive aid	
	Limited to specific sectors — Please specify in accordance with NACE Rev. 2. <sup>(5)</sup>	
Type of beneficiary	SME	
	Large enterprises	

Budget	Annual overall amount of the budget planned under the scheme <sup>(6)</sup>	National currency ... (in millions)	
	Overall amount of the ad hoc aid awarded to the undertaking <sup>(7)</sup>	National currency ... (in millions)	
	For guarantees <sup>(8)</sup>	National currency ... (in millions)	
Aid instrument (Art. 5)	Grant		
	Interest rate subsidy		
	Loan		
	Guarantee/Reference to the Commission decision <sup>(9)</sup>		
	Fiscal measure		
	Risk capital		
	Repayable advances		
	Other (please specify)		
If co-financed by Community funds	Reference(s):	Amount of Community funding	National currency ... (in millions)

<sup>(1)</sup> NUTS — Nomenclature of Territorial Units for Statistics.

<sup>(2)</sup> Article 87(3)(a) of the Treaty, Article 87(3)(c) of the Treaty, mixed areas, areas not eligible for regional aid.

<sup>(3)</sup> Period during which the granting authority can commit itself to grant the aid.

<sup>(4)</sup> Aid is to be considered to be granted at the moment the legal right to receive the aid is conferred on the beneficiary under the applicable national legal regime.

<sup>(5)</sup> NACE Rev.2 — Statistical classification of Economic Activities in the European Community.

<sup>(6)</sup> In case of an aid scheme: Indicate the annual overall amount of the budget planned under the scheme or the estimated tax loss per year for all aid instruments contained in the scheme.

<sup>(7)</sup> In case of an ad hoc aid award: Indicate the overall aid amount/tax loss.

<sup>(8)</sup> For guarantees, indicate the (maximum) amount of loans guaranteed.

<sup>(9)</sup> Where appropriate, reference to the Commission decision approving the methodology to calculate the gross grant equivalent, in line with Article 5(1)(c) of the Regulation.

## PART II

Please indicate under which provision of the GBER the aid measure is implemented.

General Objectives (list)	Objectives (list)	Maximum aid intensity in % or Maximum aid amount in national currency	SME — bonuses in %
Regional investment and employment aid <sup>(1)</sup> (Art. 13)	Scheme	... %	
	Ad hoc aid (Art. 13(1))	... %	
Aid for newly created small enterprises (Art. 14)		... %	
SME investment and employment aid (Art. 15)		... %	
Aid for small enterprises newly created by female entrepreneurs (Art. 16)		... %	
Aid for Environmental protection (Art. 17–25)	Investment aid enabling undertakings to go beyond Community standards for environmental protection or increase the level of environmental protection in the absence of Community standards (Art. 18)  Please provide a specific reference to the relevant standard	... %	
	Aid for the acquisition of new transport vehicles which go beyond Community standards or which increase the level of environmental protection in the absence of Community standards (Art. 19)	... %	
	Aid for early adaptation to future Community standards for SMEs (Art. 20)	... %	
	Environmental investment aid for energy saving measures (Art. 21)	... %	
	Environmental investment aid for high efficiency cogeneration (Art. 22)	... %	
	Environmental investment aid for the promotion of energy from renewable energy sources (Art. 23)	... %	
	Aid for environmental studies (Art. 24)	... %	
	Aid in the form of reductions in en- vironmental taxes (Art. 25)	... national currency	



General Objectives (list)	Objectives (list)		Maximum aid intensity in % or Maximum aid amount in national currency	SME — bonuses in %
Aid for consultancy in favour of SMEs and SME participation in fairs (Art. 26–27)	Aid for consultancy in favour of SMEs (Art. 26)		... %	
	Aid for SME participation in fairs (Art. 27)		... %	
Aid in the form of risk capital (Art. 28–29)			... national currency	
Aid for research, development and innovation (Art. 30–37)	Aid for research and development projects (Art. 31)	Fundamental research (Art. 31(2)(a))	... %	
		Industrial research (Art. 31(2)(b))	... %	
		Experimental development (Art. 31(2)(c))	... %	
	Aid for technical feasibility studies (Art. 32)		... %	
	Aid for industrial property rights costs for SMEs (Art. 33)		... %	
	Aid for research and development in the agricultural and fisheries sectors (Art. 34)		... %	
	Aid to young innovative enterprises (Art. 35)		... national currency	
	Aid for innovation advisory services and for innovation support services (Art. 36)		... national currency	
	Aid for the loan of highly qualified personnel (Art. 37)		... national currency	
	Training aid (Art. 38–39)	Specific training (Art. 38(1))		... %
General training (Art. 38(2))		... %		

General Objectives (list)	Objectives (list)	Maximum aid intensity in % or Maximum aid amount in national currency	SME — bonuses in %
Aid for disadvantaged and disabled workers (Art. 40–42)	Aid for the recruitment of disadvantaged workers in the form of wage subsidies (Art. 40)	... %	
	Aid for the employment of disabled workers in the form of wage subsidies (Art. 41)	... %	
	Aid for compensating the additional costs of employing disabled workers (Art. 42)	... %	

(<sup>1</sup>) In the case of ad hoc regional aid supplementing aid awarded under aid scheme(s), please indicate both the aid intensity granted under the scheme and the intensity of the ad hoc aid.

## COMMISSION REGULATION (EC) No 1998/2006

of 15 December 2006

on the application of Articles 87 and 88 of the Treaty to *de minimis* aid

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

conditions laid down in Regulation (EC) No 69/2001 and to replace that Regulation.

Having regard to the Treaty establishing the European Community,

Having regard to 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 <sup>(1)</sup>, and in particular Article 2 thereof,

Having published a draft of this Regulation <sup>(2)</sup>,

After consulting the Advisory Committee on State aid,

Whereas:

(1) Regulation (EC) No 994/98 empowers the Commission to set out in a Regulation a threshold under which aid measures are deemed not to meet all the criteria of Article 87(1) of the Treaty and therefore do not fall under the notification procedure provided for in Article 88(3) of the Treaty.

(2) The Commission has applied Articles 87 and 88 of the Treaty and has, in particular, clarified in numerous decisions the notion of aid within the meaning of Article 87(1) of the Treaty. The Commission has also stated its policy with regard to a *de minimis* ceiling, below which Article 87(1) can be considered not to apply, initially in its notice on the *de minimis* rule for State aid <sup>(3)</sup> and subsequently in Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid <sup>(4)</sup>. In the light of the experience gained in applying that Regulation and in order to take account of the evolution of inflation and gross domestic product in the Community up to and including 2006 and of the likely developments through the period of validity of this Regulation, it appears appropriate to revise some of the

(3) In view of the special rules which apply in the sectors of primary production of agricultural products, fisheries and aquaculture and of the risk that smaller amounts of aid than those set out in this Regulation could fulfil the criteria of Article 87(1) of the Treaty in those sectors, this Regulation should not apply to those sectors. Given the evolution of the transport sector, in particular the restructuring of many transport activities following their liberalisation, it is no longer appropriate to exclude the transport sector from the scope of the *de minimis* Regulation. The scope of this Regulation should therefore be extended to the whole of the transport sector. The general *de minimis* ceiling should however be adapted in order to take account of the average small size of undertakings active in the road freight and passengers transport sector. For the same reasons, and also in view of the overcapacity of the sector and of the objectives of transport policy as regards road congestion and freight transports, aid for the acquisition of road freight transport vehicles by undertakings performing road freight transport for hire and reward should be excluded. This does not call into question the Commission's favourable approach with regard to State aid for cleaner and more environmentally friendly vehicles in Community instruments other than this Regulation. In view of Council Regulation (EC) No 1407/2002 of 23 July 2002 on State aid to the coal industry <sup>(5)</sup>, this Regulation should not apply to the coal sector.

(4) Considering the similarities between the processing and marketing of agricultural products, on the one hand, and of non-agricultural products, on the other hand, this Regulation should apply to the processing and marketing of agricultural products, provided that certain conditions are met. Neither on-farm activities necessary for preparing a product for the first sale, such as harvesting, cutting and threshing of cereals, packing of eggs etc., nor the first sale to resellers or processors should be considered as processing or marketing in this respect. As from the entry into force of this Regulation, aid granted in favour of undertakings active in the processing or marketing of agricultural products should no longer be subject to Commission Regulation (EC) No 1860/2004 of 6 October 2004 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid in the agriculture and fisheries sector <sup>(6)</sup>. Regulation (EC) No 1860/2004 should therefore be amended accordingly.

<sup>(1)</sup> OJ L 142, 14.5.1998, p. 1.

<sup>(2)</sup> OJ C 137, 10.6.2006, p. 4.

<sup>(3)</sup> OJ C 68, 6.3.1996, p. 9.

<sup>(4)</sup> OJ L 10, 13.1.2001, p. 30.

<sup>(5)</sup> OJ L 205, 2.8.2002, p. 1.

<sup>(6)</sup> OJ L 325, 28.10.2004, p. 4.

- (5) The Court of Justice of the European Communities has established that, once the Community has legislated for the establishment of a common organisation of the market in a given sector of agriculture, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it. For this reason, this Regulation should not apply to aid, the amount of which is fixed on the basis of price or quantity of products purchased or put on the market. Nor should it apply to *de minimis* support which is linked to an obligation to share the aid with primary producers.
- (6) This Regulation should not apply to *de minimis* export aid or *de minimis* aid favouring domestic over imported products. In particular, it should not apply to aid financing the establishment and operation of a distribution network in other countries. Aid towards the cost of participating in trade fairs, or of studies or consultancy services needed for the launch of a new or existing product on a new market does not normally constitute export aid.
- (7) This Regulation should not apply to undertakings in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty <sup>(1)</sup> in view of the difficulties linked to determining the gross grant equivalent of aid granted to this type of undertakings.
- (8) In the light of the Commission's experience, it can be established that aid not exceeding a ceiling of EUR 200 000 over any period of three years does not affect trade between Member States and/or does not distort or threaten to distort competition and therefore does not fall under Article 87(1) of the Treaty. As regards undertakings active in the road transport sector, this ceiling should be set at EUR 100 000.
- (9) The years to take into account for this purpose are the fiscal years as used for fiscal purposes by the undertaking in the Member State concerned. The relevant period of three years should be assessed on a rolling basis so that, for each new grant of *de minimis* aid, the total amount of *de minimis* aid granted in the fiscal year concerned, as well as during the previous two fiscal years, needs to be determined. Aid granted by a Member State should be taken into account for this purpose even when financed entirely or partly by resources of Community origin. It should not be possible for aid measures exceeding the *de minimis* ceiling to be broken down into a number of smaller parts in order to bring such parts within the scope of this Regulation.
- (10) In accordance with the principles governing aid falling within Article 87(1) of the Treaty, *de minimis* aid should be considered to be granted at the moment the legal right to receive the aid is conferred on the undertaking under the applicable national legal regime.
- (11) In order to avoid circumvention of maximum aid intensities provided in different Community instruments, *de minimis* aid should not be cumulated with State aid in respect of the same eligible costs if such cumulation would result in an aid intensity exceeding that fixed in the specific circumstances of each case by a block exemption Regulation or Decision adopted by the Commission.
- (12) For the purposes of transparency, equal treatment and the correct application of the *de minimis* ceiling, all Member States should apply the same method of calculation. In order to facilitate this calculation and in accordance with the present practice of application of the *de minimis* rule, aid amounts not taking the form of a cash grant should be converted into their gross grant equivalent. Calculation of the grant equivalent of transparent types of aid other than grants or of aid payable in several instalments requires the use of market interest rates prevailing at the time of granting such aid. With a view to a uniform, transparent and simple application of the State aid rules, the market rates for the purposes of this Regulation should be deemed to be the reference rates periodically fixed by the Commission on the basis of objective criteria and published in the *Official Journal of the European Union* or on the Internet. It may, however, be necessary to add additional basis points on top of the floor rate in view of the securities provided or the risk associated with the beneficiary.
- (13) For the purposes of transparency, equal treatment and effective monitoring, this Regulation should apply only to *de minimis* aid which is transparent. Transparent aid is aid for which it is possible to calculate precisely the gross grant equivalent *ex ante* without a need to undertake a risk assessment. Such precise calculation can, for instance, be realised as regards grants, interest rate subsidies and capped tax exemptions. Aid comprised in capital injections should not be considered as transparent *de minimis* aid, unless the total amount of the public injection is lower than the *de minimis* ceiling. Aid comprised in risk capital measures as referred to in the

<sup>(1)</sup> OJ C 244, 1.10.2004, p. 2.

Community guidelines on State aid to promote risk capital investments in small and medium-sized enterprises<sup>(1)</sup> should not be considered as transparent *de minimis* aid, unless the risk capital scheme concerned provides capital only up to the *de minimis* ceiling to each target undertaking. Aid comprised in loans should be treated as transparent *de minimis* aid when the gross grant equivalent has been calculated on the basis of market interest rates prevailing at the time of grant.

(14) This Regulation does not exclude the possibility that a measure, adopted by a Member State, might not be considered as State aid within the meaning of Article 87(1) of the Treaty on the basis of other grounds than those set out in this Regulation, for instance, in the case of capital injections, because such measure has been decided in conformity with the market investor principle.

(15) It is necessary to provide legal certainty for guarantee schemes which do not have the potential to affect trade and distort competition and in respect of which sufficient data is available to assess any potential effects reliably. This Regulation should therefore transpose the general *de minimis* ceiling of EUR 200 000 into a guarantee-specific ceiling based on the guaranteed amount of the individual loan underlying such guarantee. It is appropriate to calculate this specific ceiling using a methodology assessing the State aid amount included in guarantee schemes covering loans in favour of viable undertakings. The methodology and the data used to calculate the guarantee-specific ceiling should exclude undertakings in difficulty as referred to in the Community guidelines on State aid for rescuing and restructuring firms in difficulty. This specific ceiling should therefore not apply to ad hoc individual aid granted outside the scope of a guarantee scheme, to aid granted to undertakings in difficulty, or to guarantees on underlying transactions not constituting a loan, such as guarantees on equity transactions. The specific ceiling should be determined on the basis of the fact that taking account of a cap rate (net default rate) of 13 %, representing a worst case scenario for guarantee schemes in the Community, a guarantee amounting to EUR 1 500 000 can be considered as having a gross grant equivalent identical to the general *de minimis* ceiling. This amount should be reduced to EUR 750 000 as regards undertakings active in the road transport sector. Only guarantees covering up to 80 % of the underlying loan should be covered by these specific ceilings. A methodology accepted by the Commission following notification of such methodology on the basis of a Commission Regulation in the State aid area, like Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid<sup>(2)</sup>, may also be used by Member States for the purpose of

assessing the gross grant equivalent contained in a guarantee, if the approved methodology explicitly addresses the type of guarantees and the type of underlying transactions at stake in the context of the application of the present Regulation.

(16) Upon notification by a Member State, the Commission may examine whether an aid measure which does not consist in a grant, loan, guarantee, capital injection or risk capital measure leads to a gross grant equivalent that does not exceed the *de minimis* ceiling and could therefore be covered by the provisions of this Regulation.

(17) The Commission has a duty to ensure that State aid rules are respected and in particular that aid granted under the *de minimis* rules adheres to the conditions thereof. In accordance with the cooperation principle laid down in Article 10 of the Treaty, Member States should facilitate the achievement of this task by establishing the necessary machinery in order to ensure that the total amount of *de minimis* aid, granted to the same undertaking under the *de minimis* rule, does not exceed the ceiling of EUR 200 000 over a period of three fiscal years. To that end, when granting a *de minimis* aid, Member States should inform the undertaking concerned of the amount of the aid and of its *de minimis* character, by referring to this Regulation. Moreover, prior to granting such aid the Member State concerned should obtain from the undertaking a declaration about other *de minimis* aid received during the fiscal year concerned and the two previous fiscal years and carefully check that the *de minimis* ceiling will not be exceeded by the new *de minimis* aid. Alternatively it should be possible to ensure that the ceiling is respected by means of a central register, or, in the case of guarantee schemes set up by the European Investment Fund, the latter may establish itself a list of beneficiaries and require Member States to inform the beneficiaries of the *de minimis* aid received.

(18) Regulation (EC) No 69/2001 expires on 31 December 2006. This Regulation should therefore apply from 1 January 2007. In view of the fact that Regulation (EC) No 69/2001 did not apply to the transport sector, which was not subject to *de minimis* so far; given also the very limited *de minimis* amount applicable in the sector of processing and marketing of agricultural products, and provided that certain conditions are met, this Regulation should apply to aid granted before its entry into force to undertakings active in the transport sector, and in the sector of processing and marketing of agricultural products. Moreover, any individual aid granted in accordance with Regulation (EC) No 69/2001 during the period of application of that Regulation should remain unaffected by this Regulation.

<sup>(1)</sup> OJ C 194, 18.8.2006, p. 2.

<sup>(2)</sup> OJ L 302, 1.11.2006, p. 29.

(19) Having regard to the Commission's experience and in particular the frequency with which it is generally necessary to revise State aid policy, it is appropriate to limit the period of application of this Regulation. Should this Regulation expire without being extended, Member States should have an adjustment period of six months with regard to *de minimis* aid covered by this Regulation,

(h) aid granted to undertakings in difficulty.

HAS ADOPTED THIS REGULATION:

#### Article 1

##### Scope

1. This Regulation applies to aid granted to undertakings in all sectors, with the exception of:

(a) aid granted to undertakings active in the fishery and aquaculture sectors, as covered by Council Regulation (EC) No 104/2000 <sup>(1)</sup>;

(b) aid granted to undertakings active in the primary production of agricultural products as listed in Annex I to the Treaty;

(c) aid granted to undertakings active in the processing and marketing of agricultural products as listed in Annex I to the Treaty, in the following cases:

(i) when the amount of the aid is fixed on the basis of the price or quantity of such products purchased from primary producers or put on the market by the undertakings concerned,

(ii) when the aid is conditional on being partly or entirely passed on to primary producers;

(d) aid to export-related activities towards third countries or Member States, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity;

(e) aid contingent upon the use of domestic over imported goods;

(f) aid granted to undertakings active in the coal sector, as defined in Regulation (EC) No 1407/2002;

(g) aid for the acquisition of road freight transport vehicles granted to undertakings performing road freight transport for hire or reward;

2. For the purposes of this Regulation:

(a) 'agricultural products' means products listed in Annex I to the EC Treaty, with the exception of fishery products;

(b) 'processing of agricultural products' means any operation on an agricultural product resulting in a product which is also an agricultural product, except on farm activities necessary for preparing an animal or plant product for the first sale;

(c) 'marketing of agricultural products' means holding or display with a view to sale, offering for sale, delivery or any other manner of placing on the market, except the first sale by a primary producer to resellers or processors and any activity preparing a product for such first sale; a sale by a primary producer to final consumers shall be considered as marketing if it takes place in separate premises reserved for that purpose.

#### Article 2

##### *De minimis* aid

1. Aid measures shall be deemed not to meet all the criteria of Article 87(1) of the Treaty and shall therefore be exempt from the notification requirement of Article 88(3) of the Treaty, if they fulfil the conditions laid down in paragraphs 2 to 5 of this Article.

2. The total *de minimis* aid granted to any one undertaking shall not exceed EUR 200 000 over any period of three fiscal years. The total *de minimis* aid granted to any one undertaking active in the road transport sector shall not exceed EUR 100 000 over any period of three fiscal years. These ceilings shall apply irrespective of the form of the *de minimis* aid or the objective pursued and regardless of whether the aid granted by the Member State is financed entirely or partly by resources of Community origin. The period shall be determined by reference to the fiscal years used by the undertaking in the Member State concerned.

When an overall aid amount provided under an aid measure exceeds this ceiling, that aid amount cannot benefit from this Regulation, even for a fraction not exceeding that ceiling. In such a case, the benefit of this Regulation cannot be claimed for this aid measure either at the time the aid is granted or at any subsequent time.

<sup>(1)</sup> OJ L 17, 21.1.2000, p. 22.

3. The ceiling laid down in paragraph 2 shall be expressed as a cash grant. All figures used shall be gross, that is, before any deduction of tax or other charge. Where aid is awarded in a form other than a grant, the aid amount shall be the gross grant equivalent of the aid.

Aid payable in several instalments shall be discounted to its value at the moment of its being granted. The interest rate to be used for discounting purposes and to calculate the gross grant equivalent shall be the reference rate applicable at the time of grant.

4. This Regulation shall apply only to aid in respect of which it is possible to calculate precisely the gross grant equivalent of the aid *ex ante* without need to undertake a risk assessment ('transparent aid'). In particular:

- (a) Aid comprised in loans shall be treated as transparent *de minimis* aid when the gross grant equivalent has been calculated on the basis of market interest rates prevailing at the time of the grant.
- (b) Aid comprised in capital injections shall not be considered as transparent *de minimis* aid, unless the total amount of the public injection does not exceed the *de minimis* ceiling.
- (c) Aid comprised in risk capital measures shall not be considered as transparent *de minimis* aid, unless the risk capital scheme concerned provides capital only up to the *de minimis* ceiling to each target undertaking.
- (d) Individual aid provided under a guarantee scheme to undertakings which are not undertakings in difficulty shall be treated as transparent *de minimis* aid when the guaranteed part of the underlying loan provided under such scheme does not exceed EUR 1 500 000 per undertaking. Individual aid provided under a guarantee scheme in favour of undertakings active in the road transport sector which are not undertakings in difficulty shall be treated as transparent *de minimis* aid when the guaranteed part of the underlying loan provided under such scheme does not exceed EUR 750 000 per undertaking. If the guaranteed part of the underlying loan only accounts for a given proportion of this ceiling, the gross grant equivalent of that guarantee shall be deemed to correspond to the same proportion of the applicable ceiling laid down in Article 2(2). The guarantee shall not exceed 80 % of the underlying loan. Guarantee schemes shall also be considered as transparent if (i) before the implementation of the scheme, the methodology to calculate the gross grant equivalent of the guarantees has been accepted following notification of this methodology to the Commission under another Regulation adopted by the Commission in the State aid area and (ii) the approved methodology explicitly addresses the type of guarantees and the type of underlying transactions at stake in the context of the application of this Regulation.

5. *De minimis* aid shall not be cumulated with State aid in respect of the same eligible costs if such cumulation would result in an aid intensity exceeding that fixed in the specific circumstances of each case by a block exemption Regulation or Decision adopted by the Commission.

### Article 3

#### Monitoring

1. Where a Member State intends to grant *de minimis* aid to an undertaking, it shall inform that undertaking in writing of the prospective amount of the aid (expressed as gross grant equivalent) and of its *de minimis* character, making express reference to this Regulation, and citing its title and publication reference in the *Official Journal of the European Union*. Where the *de minimis* aid is granted to different undertakings on the basis of a scheme and different amounts of individual aid are granted to those undertakings under the scheme, the Member State concerned may choose to fulfil this obligation by informing the undertakings of a fixed sum corresponding to the maximum aid amount to be granted under the scheme. In such case, the fixed sum shall be used for determining whether the ceiling laid down in Article 2(2) is met. Prior to granting the aid, the Member State shall also obtain a declaration from the undertaking concerned, in written or electronic form, about any other *de minimis* aid received during the previous two fiscal years and the current fiscal year.

The Member State shall only grant the new *de minimis* aid after having checked that this will not raise the total amount of *de minimis* aid received by the undertaking during the period covering the fiscal year concerned, as well as the previous two fiscal years in that Member State, to a level above the ceiling laid down in Article 2(2).

2. Where a Member State has set up a central register of *de minimis* aid containing complete information on all *de minimis* aid granted by any authority within that Member State, the first subparagraph of paragraph 1 shall cease to apply from the moment the register covers a period of three years.

Where an aid is provided by a Member State on the basis of a guarantee scheme providing a guarantee which is financed from the EU budget under mandate through the European Investment Fund, the first subparagraph of paragraph 1 of this Article may cease to apply.

In such cases, the following monitoring system shall apply:

- (a) the European Investment Fund shall establish, on a yearly basis, on the basis of information that financial intermediaries must provide to the EIF, a list of beneficiaries of aid and of the gross grant equivalent received by each of them. The European Investment Fund shall send this information to the Member State concerned and to the Commission; and

- (b) the Member State concerned shall disseminate that information to the final beneficiaries within three months of receipt of such information from the European Investment Fund; and
- (c) the Member State concerned shall obtain a declaration from each beneficiary that the overall *de minimis* aid it has received does not exceed the ceiling laid down in Article 2(2). In case the ceiling is exceeded with respect to one or more beneficiaries, the Member State concerned shall ensure that the aid measure leading to the ceiling being exceeded is either notified to the Commission or recovered from the beneficiary.

3. Member States shall record and compile all the information regarding the application of this Regulation. Such records shall contain all information necessary to demonstrate that the conditions of this Regulation have been complied with. Records regarding individual *de minimis* aid shall be maintained for 10 years from the date on which it was granted. Records regarding a *de minimis* aid scheme shall be maintained for 10 years from the date on which the last individual aid was granted under such scheme. On written request the Member State concerned shall provide the Commission, within a period of 20 working days, or such longer period as may be fixed in the request, with all the information that the Commission considers necessary for assessing whether the conditions of this Regulation have been complied with, in particular the total amount of *de minimis* aid received by any undertaking.

#### Article 4

#### Amendment

Article 2 of Regulation (EC) No 1860/2004 is amended as follows:

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

Done at Brussels, 15 December 2006.

- (a) in point 1, the words 'processing and marketing' are deleted;
- (b) point 3 is deleted.

#### Article 5

#### Transitional measures

1. This Regulation shall apply to aid granted before its entry into force to undertakings active in the transport sector and undertakings active in the processing and marketing of agricultural products if the aid fulfils all the conditions laid down in Articles 1 and 2. Any aid which does not fulfil those conditions will be assessed by the Commission in accordance with the relevant frameworks, guidelines, communications and notices.

2. Any individual *de minimis* aid granted between 2 February 2001 and 30 June 2007, which fulfils the conditions of Regulation (EC) No 69/2001, shall be deemed not to meet all the criteria of Article 87(1) of the Treaty and shall therefore be exempt from the notification requirement of Article 88(3) of the Treaty.

3. At the end of the period of validity of this Regulation, any *de minimis* aid which fulfils the conditions of this Regulation may be validly implemented for a further period of six months.

#### Article 6

#### Entry into force and period of validity

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

It shall apply from 1 January 2007 until 31 December 2013.

For the Commission

Neelie KROES

Member of the Commission



## **7. Other Commission Communications and Notices**

### **7.1. Commission Notice on the application of Articles 87 and 88 of the EC Treaty [Articles 107 and 108 TFEU] to State aid in the form of guarantees**

Official Journal C 155 of 20.06.2008, page 10

*Corrigendum to Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees*

Official Journal C 244 of 25.09.2008, page 32

### **7.2. Commission communication concerning aid elements in land sales by public authorities**

Official Journal C 209 of 10.7.1997, pages 3-5

## Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees

(2008/C 155/02)

This Notice replaces the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 71, 11.3.2000, p. 14).

### 1. INTRODUCTION

#### 1.1. Background

This Notice updates the Commission's approach to State aid granted in the form of guarantees and aims to give Member States more detailed guidance about the principles on which the Commission intends to base its interpretation of Articles 87 and 88 and their application to State guarantees. These principles are currently laid down in the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees <sup>(1)</sup>. Experience gained in the application of this Notice since 2000 suggests that the Commission's policy in this area should be reviewed. In this connection, the Commission wishes to recall for instance its recent practice in various specific decisions <sup>(2)</sup> with respect to the need to undertake an individual assessment of the risk of losses related to each guarantee in the case of schemes. The Commission intends to further make its policy in this area as transparent as possible so that its decisions are predictable and that equal treatment is ensured. In particular, the Commission wishes to provide small and medium-sized enterprises (hereafter 'SMEs') and Member States with safe-harbours predetermining, for a given company and on the basis of its financial rating, the minimum margin that should be charged for a State guarantee in order to be deemed as not constituting aid within the scope of Article 87(1) of the Treaty. Likewise, any shortfall in the premium charged in comparison with that level could be deemed as the aid element.

#### 1.2. Types of guarantee

In their most common form, guarantees are associated with a loan or other financial obligation to be contracted by a borrower with a lender; they may be granted as individual guarantees or within guarantee schemes.

However, various forms of guarantee may exist, depending on their legal basis, the type of transaction covered, their duration, etc. Without the list being exhaustive, the following forms of guarantee can be identified:

- general guarantees, i.e. guarantees provided to undertakings as such as opposed to guarantees linked to a specific transaction, which may be a loan, an equity investment, etc.,
- guarantees provided by a specific instrument as opposed to guarantees linked to the status of the undertaking itself,
- guarantees provided directly or counter guarantees provided to a first level guarantor,
- unlimited guarantees as opposed to guarantees limited in amount and/or time. The Commission also regards as aid in the form of a guarantee the more favourable funding terms obtained by enterprises whose legal form rules out bankruptcy or other insolvency procedures or provides an explicit State guarantee or coverage of losses by the State. The same applies to the acquisition by a State of a holding in an enterprise if unlimited liability is accepted instead of the usual limited liability,
- guarantees clearly originating from a contractual source (such as formal contracts, letters of comfort) or another legal source as opposed to guarantees whose form is less visible (such as side letters, oral commitments), possibly with various levels of comfort that can be provided by this guarantee.

<sup>(1)</sup> OJ C 71, 11.3.2000, p. 14.

<sup>(2)</sup> For example: Commission Decision 2003/706/EC of 23 April 2003 on the aid scheme implemented by Germany entitled 'Guarantee schemes of the Land of Brandenburg for 1991 and 1994' — State aid C 45/98 (ex NN 45/97) (OJ L 263, 14.10.2003, p. 1); Commission Decision of 16 December 2003 on the guarantee schemes in ship financing — Germany (N 512/03) (OJ C 62, 11.3.2004, p. 3); Commission Decision 2006/599/EC of 6 April 2005 on the aid scheme which Italy is planning to implement for ship financing (OJ L 244, 7.9.2006, p. 17).

Especially in the latter case, the lack of appropriate legal or accounting records often leads to very poor traceability. This is true both for the beneficiary and for the State or public body providing it and, as a result, for the information available to third parties.

### 1.3. Structure and scope of the Notice

For the purpose of this Notice:

- (a) 'guarantee scheme' means any tool on the basis of which, without further implementing measures being required, guarantees can be provided to undertakings respecting certain conditions of duration, amount, underlying transaction, type or size of undertakings (such as SMEs);
- (b) 'individual guarantee' means any guarantee provided to an undertaking and not awarded on the basis of a guarantee scheme.

Sections 3 and 4 of this Notice are designed to be directly applicable to guarantees linked to a specific financial transaction such as a loan. The Commission considers that, owing to their frequency and the fact that they can usually be quantified, these are the cases where guarantees most need to be classed as constituting State aid or otherwise.

As in most cases the transaction covered by a guarantee would be a loan, the Notice will further refer to the principal beneficiary of the guarantee as the 'borrower' and to the body whose risk is diminished by the State guarantee as the 'lender'. The use of these two specific terms also aims to facilitate understanding of the rationale underpinning the text, since the basic principle of a loan is broadly understood. However, it does not ensue that Sections 3 and 4 are only applicable to a loan guarantee. They apply to all guarantees where a similar transfer of risk takes place such as an investment in the form of equity, provided the relevant risk profile (including the possible lack of collateralisation) is taken into account.

The Notice applies to all economic sectors, including the agriculture, fisheries and transport sectors without prejudice to specific rules relating to guarantees in the sector concerned.

This Notice does not apply to export credit guarantees.

### 1.4. Other types of guarantee

Where certain forms of guarantee (see point 1.2) involve a transfer of risk to the guarantor and where they do not display one or more of the specific features referred to in point 1.3, for instance insurance guarantees, a case-by-case analysis will have to be made for which, as far as is necessary, the applicable Sections or methodologies described in this Notice will be applied.

### 1.5. Neutrality

This Notice applies without prejudice to Article 295 of the Treaty and thus does not prejudice the rules in Member States governing the system of property ownership. The Commission is neutral as regards public and private ownership.

In particular, the mere fact that the ownership of an undertaking is largely in public hands is not sufficient in itself to constitute a State guarantee provided there are no explicit or implicit guarantee elements.

## 2. APPLICABILITY OF ARTICLE 87(1)

### 2.1. General remarks

Article 87(1) of the Treaty states that 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 shall, in so far as it affects trade between Member States, be incompatible with the common market.

These general criteria equally apply to guarantees. As for other forms of potential aid, guarantees given directly by the State, namely by central, regional or local authorities, as well as guarantees given through State resources by other State-controlled bodies such as undertakings and imputable to public authorities <sup>(3)</sup>, may constitute State aid.

In order to avoid any doubts, the notion of State resources should thus be clarified as regards State guarantees. The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. Such risk-carrying by the State should normally be remunerated by an appropriate premium. Where the State forgoes all or part of such a premium, there is both a benefit for the undertaking and a drain on the resources of the State. Thus, even if it turns out that no payments are ever made by the State under a guarantee, there may nevertheless be State aid under Article 87(1) of the Treaty. The aid is granted at the moment when the guarantee is given, not when the guarantee is invoked nor when payments are made under the terms of the guarantee. Whether or not a guarantee constitutes State aid, and, if so, what the amount of that State aid may be, must be assessed at the moment when the guarantee is given.

In this context the Commission points out that the analysis under State aid rules does not prejudice the compatibility of a given measure with other Treaty provisions.

## 2.2. Aid to the borrower

Usually, the aid beneficiary is the borrower. As indicated under point 2.1, risk-carrying should normally be remunerated by an appropriate premium. When the borrower does not need to pay the premium, or pays a low premium, it obtains an advantage. Compared to a situation without guarantee, the State guarantee enables the borrower to obtain better financial terms for a loan than those normally available on the financial markets. Typically, with the benefit of the State guarantee, the borrower can obtain lower rates and/or offer less security. In some cases, the borrower would not, without a State guarantee, find a financial institution prepared to lend on any terms. State guarantees may thus facilitate the creation of new business and enable certain undertakings to raise money in order to pursue new activities. Likewise, a State guarantee may help a failing firm remain active instead of being eliminated or restructured, thereby possibly creating distortions of competition.

## 2.3. Aid to the lender

2.3.1. Even if usually the aid beneficiary is the borrower, it cannot be ruled out that under certain circumstances the lender, too, will directly benefit from the aid. In particular, for example, if a State guarantee is given *ex post* in respect of a loan or other financial obligation already entered into without the terms of this loan or financial obligation being adjusted, or if one guaranteed loan is used to pay back another, non-guaranteed loan to the same credit institution, then there may also be aid to the lender, in so far as the security of the loans is increased. Where the guarantee contains aid to the lender, attention should be drawn to the fact that such aid might, in principle, constitute operating aid.

2.3.2. Guarantees differ from other State aid measures, such as grants or tax exemptions, in that, in the case of a guarantee, the State also enters into a legal relationship with the lender. Therefore, consideration has to be given to the possible consequences for third parties of State aid that has been illegally granted. In the case of State guarantees for loans, this concerns mainly the lending financial institutions. In the case of guarantees for bonds issued to obtain financing for undertakings, this concerns the financial institutions involved in the issuance of the bonds. The question whether the illegality of the aid affects the legal relations between the State and third parties is a matter which has to be examined under national law. National courts may have to examine whether national law prevents the guarantee contracts from being honoured, and in that assessment the Commission considers that they should take account of the breach of Community law. Accordingly, lenders may have an interest in verifying, as a standard precaution, that the Community rules on State aid have been observed whenever guarantees are granted. The Member State should be able to provide a case number issued by the Commission for an individual case or a scheme and possibly a non-confidential copy of the Commission's decision together with the relevant reference to the *Official Journal of the European Union*. The Commission for its part will do its utmost to make available in a transparent manner information on cases and schemes approved by it.

<sup>(3)</sup> See Case C-482/99, *France v Commission* (Stardust) [2002] ECR I-4397.

### 3. CONDITIONS RULING OUT THE EXISTENCE OF AID

#### 3.1. General considerations

If an individual guarantee or a guarantee scheme entered into by the State does not bring any advantage to an undertaking, it will not constitute State aid.

In this context, in order to determine whether an advantage is being granted through a guarantee or a guarantee scheme, the Court has confirmed in its recent judgments <sup>(4)</sup> that the Commission should base its assessment on the principle of an investor operating in a market economy (hereafter referred to as the 'market economy investor principle'). Account should therefore be taken of the effective possibilities for a beneficiary undertaking to obtain equivalent financial resources by having recourse to the capital market. State aid is not involved where a new funding source is made available on conditions which would be acceptable for a private operator under the normal conditions of a market economy <sup>(5)</sup>.

In order to facilitate the assessment of whether the market economy investor principle is fulfilled for a given guarantee measure, the Commission sets out in this Section a number of sufficient conditions for the absence of aid. Individual guarantees are covered in point 3.2 with a simpler option for SMEs in point 3.3. Guarantee schemes are covered in point 3.4 with a simpler option for SMEs in point 3.5.

#### 3.2. Individual guarantees

Regarding an individual State guarantee, the Commission considers that the fulfilment of all the following conditions will be sufficient to rule out the presence of State aid.

- (a) The borrower is not in financial difficulty.

In order to decide whether the borrower is to be seen as being in financial difficulty, reference should be made to the definition set out in the Community guidelines on State aid for rescuing and restructuring firms in difficulty <sup>(6)</sup>. SMEs which have been incorporated for less than three years shall not be considered as being in difficulty for that period for the purposes of this Notice.

- (b) The extent of the guarantee can be properly measured when it is granted. This means that the guarantee must be linked to a specific financial transaction, for a fixed maximum amount and limited in time.
- (c) The guarantee does not cover more than 80 % of the outstanding loan or other financial obligation; this limitation does not apply to guarantees covering debt securities <sup>(7)</sup>.

The Commission considers that if a financial obligation is wholly covered by a State guarantee, the lender has less incentive to properly assess, secure and minimise the risk arising from the lending operation, and in particular to properly assess the borrower's creditworthiness. Such risk assessment might, due to lack of means, not always be taken over by the State guarantor. This lack of incentive to minimise the risk of non-repayment of the loan might encourage lenders to contract loans with a greater than normal commercial risk and could thus increase the amount of higher-risk guarantees in the State's portfolio.

<sup>(4)</sup> See Case C-482/99 referred to in footnote 3.

<sup>(5)</sup> See Commission Communication on the application of Article 92 and 93 of the EC Treaty to public shareholdings (Bulletin of the European Communities No 9-1984); Joined Cases 296/82 and 318/82, *Netherlands and Leeuwarder Papierwarenfabriek BV v Commission* [1985] ECR 809, paragraph 17. Commission Communication on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aid in the aviation sector (OJ C 350, 10.12.1994, p. 5), points 25 and 26.

<sup>(6)</sup> OJ C 244, 1.10.2004, p. 2.

<sup>(7)</sup> For the definition of 'debt securities', see Article 2(1)(b) of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ L 390, 31.12.2004, p. 38). Directive as last amended by Directive 2008/22/EC (OJ L 76, 19.3.2008, p. 50).

This limitation of 80 % does not apply to a public guarantee granted to finance a company whose activity is solely constituted by a properly entrusted Service of General Economic Interest (SGEI) <sup>(8)</sup> and when this guarantee has been provided by the public authority having put in place this entrustment. The limitation of 80 % applies if the company concerned provides other SGEIs or other economic activities.

In order to ensure that the lender effectively bears part of the risk, due attention must be given to the following two aspects:

- when the size of the loan or of the financial obligation decreases over time, for instance because the loan starts to be reimbursed, the guaranteed amount has to decrease proportionally, in such a way that at each moment in time the guarantee does not cover more than 80 % of the outstanding loan or financial obligation,
- losses have to be sustained proportionally and in the same way by the lender and the guarantor. In the same manner, net recoveries (i.e. revenues excluding costs for claim handling) generated from the recuperation of the debt from the securities given by the borrower have to reduce proportionally the losses borne by the lender and the guarantor. First-loss guarantees, where losses are first attributed to the guarantor and only then to the lender, will be regarded as possibly involving aid.

If a Member State wishes to provide a guarantee above the 80 % threshold and claims that it does not constitute aid, it should duly substantiate the claim, for instance on the basis of the arrangement of the whole transaction, and notify it to the Commission so that the guarantee can be properly assessed with regards to its possible State aid character.

- (d) A market-oriented price is paid for the guarantee.

As indicated under point 2.1, risk-carrying should normally be remunerated by an appropriate premium on the guaranteed or counter-guaranteed amount. When the price paid for the guarantee is at least as high as the corresponding guarantee premium benchmark that can be found on the financial markets, the guarantee does not contain aid.

If no corresponding guarantee premium benchmark can be found on the financial markets, the total financial cost of the guaranteed loan, including the interest rate of the loan and the guarantee premium, has to be compared to the market price of a similar non-guaranteed loan.

In both cases, in order to determine the corresponding market price, the characteristics of the guarantee and of the underlying loan should be taken into consideration. This includes: the amount and duration of the transaction; the security given by the borrower and other experience affecting the recovery rate evaluation; the probability of default of the borrower due to its financial position, its sector of activity and prospects; as well as other economic conditions. This analysis should notably allow the borrower to be classified by means of a risk rating. This classification may be provided by an internationally recognised rating agency or, where available, by the internal rating used by the bank providing the underlying loan. The Commission points to the link between rating and default rate made by international financial institutions, whose work is also publicly available <sup>(9)</sup>. To assess whether the premium is in line with the market prices the Member State can carry out a comparison of prices paid by similarly rated undertakings on the market.

The Commission will therefore not accept that the guarantee premium is set at a single rate deemed to correspond to an overall industry standard.

<sup>(8)</sup> Such an SGEI must comply with Community rules such as Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67), and the Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4).

<sup>(9)</sup> Such as Table 1 on agencies' credit ratings to be found in the Bank for International Settlements Working Paper No 207, available at: <http://www.bis.org/publ/work207.pdf>

### 3.3. Valuation of individual guarantees for SMEs

As an exception, if the borrower is an SME <sup>(10)</sup>, the Commission can by way of derogation from point 3.2(d) accept a simpler evaluation of whether or not a loan guarantee involves aid. In that case, and provided all the other conditions laid down in points 3.2(a), (b) and (c) are met, a State guarantee would be deemed as not constituting aid if the minimum annual premium ('safe-harbour premium' <sup>(11)</sup>) set out in the following table is charged on the amount effectively guaranteed by the State, based on the rating of the borrower <sup>(12)</sup>:

Credit quality	Standard & Poor's	Fitch	Moody's	Annual safe-harbour premium
Highest quality	AAA	AAA	Aaa	0,4 %
Very strong payment capacity	AA +	AA +	Aa 1	0,4 %
	AA	AA	Aa 2	
	AA –	AA –	Aa 3	
Strong payment capacity	A +	A +	A 1	0,55 %
	A	A	A 2	
	A –	A –	A 3	
Adequate payment capacity	BBB +	BBB +	Baa 1	0,8 %
	BBB	BBB	Baa 2	
	BBB –	BBB –	Baa 3	
Payment capacity is vulnerable to adverse conditions	BB +	BB +	Ba 1	2,0 %
	BB	BB	Ba 2	
	BB –	BB –	Ba 3	
Payment capacity is likely to be impaired by adverse conditions	B +	B +	B 1	3,8 %
	B	B	B 2	6,3 %
	B –	B –	B 3	
Payment capacity is dependent upon sustained favourable conditions	CCC +	CCC +	Caa 1	No safe-harbour annual premium can be provided
	CCC	CCC	Caa 2	
	CCC –	CCC –	Caa 3	
	CC	CC		
In or near default	SD	DDD	Ca	No safe-harbour annual premium can be provided
	D	DD	C	
		D		

<sup>(10)</sup> 'SMEs' refer to small and medium-sized enterprises as defined in Annex I to Regulation (EC) No 70/2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33). Regulation as last amended by Regulation (EC) No 1976/2006 (OJ L 368, 23.12.2006, p. 85).

<sup>(11)</sup> These safe-harbour premiums are established in line with the margins determined for loans to similarly rated undertakings in the Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6). Following the study commissioned by the Commission on that topic: ([http://ec.europa.eu/comm/competition/state\\_aid/studies\\_reports/full\\_report.pdf](http://ec.europa.eu/comm/competition/state_aid/studies_reports/full_report.pdf), see pages 23 and 156-159 of the study), a general reduction of 20 basis points has been taken into account. This reduction corresponds to the difference in margin for a similar risk between a loan and a guarantee in order to take into account the additional costs specifically linked to loans.

<sup>(12)</sup> The table refers to the rating classes of Standard & Poor's, Fitch and Moody's, which are the rating agencies most frequently used by the banking sector in order to link their own rating system, as described in point 3.2(d). However, ratings do not need to be obtained from those specific rating agencies. National rating systems or rating systems used by banks to reflect default rates are equally acceptable provided they supply the one-year probability of default as this figure is used by rating agencies to rank companies. Other systems should allow for a similar classification through this ranking key.

The safe-harbour premiums apply to the amount effectively guaranteed or counter-guaranteed by the State at the beginning of each year concerned. They must be considered as the minimum to be applied with respect to a company whose credit rating is at least equal to those given in the table <sup>(13)</sup>.

In the case of a single upfront guarantee premium, the loan guarantee is deemed to be free of aid if it is at least equal to the present value of the future guarantee premiums as indicated above, the discount rate used being the corresponding reference rate <sup>(14)</sup>.

As outlined in the table above, companies with a rating corresponding to CCC/Caa or worse cannot benefit from this simplified methodology.

For SMEs which do not have a credit history or a rating based on a balance sheet approach, such as certain special purpose companies or start-up companies, the safe-harbour premium is set at 3,8 % but this can never be lower than the premium which would be applicable to the parent company or companies.

These margins may be revised from time to time to take account of the market situation.

### 3.4. Guarantee schemes

For a State guarantee scheme, the Commission considers that the fulfilment of all the following conditions will rule out the presence of State aid:

- (a) the scheme is closed to borrowers in financial difficulty (see details in point 3.2(a));
- (b) the extent of the guarantees can be properly measured when they are granted. This means that the guarantees must be linked to specific financial transactions, for a fixed maximum amount and limited in time;
- (c) the guarantees do not cover more than 80 % of each outstanding loan or other financial obligation (see details and exceptions in point 3.2(c));
- (d) the terms of the scheme are based on a realistic assessment of the risk so that the premiums paid by the beneficiaries make it, in all probability, self-financing. The self-financing nature of the scheme and the proper risk orientation are viewed by the Commission as indications that the guarantee premiums charged under the scheme are in line with market prices.

This entails that the risk of each new guarantee has to be assessed, on the basis of all the relevant factors (quality of the borrower, securities, duration of the guarantee, etc). On the basis of this risk analysis, risk classes <sup>(15)</sup> have to be defined, the guarantee has to be classified in one of these risk classes and the corresponding guarantee premium has to be charged on the guaranteed or counter-guaranteed amount;

- (e) in order to have a proper and progressive evaluation of the self-financing aspect of the scheme, the adequacy of the level of the premiums has to be reviewed at least once a year on the basis of the effective loss rate of the scheme over an economically reasonable time horizon, and premiums adjusted accordingly if there is a risk that the scheme may no longer be self-financing. This adjustment may concern all issued and future guarantees or only the latter;
- (f) in order to be viewed as being in line with market prices, the premiums charged have to cover the normal risks associated with granting the guarantee, the administrative costs of the scheme, and a yearly remuneration of an adequate capital, even if the latter is not at all or only partially constituted.

As regards administrative costs, these should include at least the specific initial risk assessment as well as the risk monitoring and risk management costs linked to the granting and administration of the guarantee.

<sup>(13)</sup> For example, a company to which a bank assigns a credit rating corresponding to BBB-/Baa3 should be charged a yearly guarantee premium of at least 0,8 % on the amount effectively guaranteed by the State at the beginning of each year.

<sup>(14)</sup> See the Communication referred to in footnote 11 providing that: 'The reference rate is also to be used as a discount rate, for calculating present values. To that end, in principle, the base rate increased by a fixed margin of 100 basis points will be used' (p. 4).

<sup>(15)</sup> See further details in footnote 12.



As regards the remuneration of the capital, the Commission observes that usual guarantors are subject to capital requirement rules and, in accordance with these rules, are forced to constitute equity in order not to go bankrupt when there are variations in the yearly losses related to the guarantees. State guarantee schemes are normally not subject to these rules and thus do not need to constitute such reserves. In other words, each time the losses stemming from the guarantees exceed the revenues from the guarantee premiums, the deficit is simply covered by the State budget. This State guarantee to the scheme puts the latter in a more favourable situation than a usual guarantor. In order to avoid this disparity and to remunerate the State for the risk it is taking, the Commission considers that the guarantee premiums have to cover the remuneration of an adequate capital.

The Commission considers that this capital has to correspond to 8 % <sup>(16)</sup> of the outstanding guarantees. For guarantees granted to undertakings whose rating is equivalent to AAA/AA- (Aaa/Aa3), the amount of capital to be remunerated can be reduced to 2 % of the outstanding guarantees. Meanwhile, with regard to guarantees granted to undertakings whose rating is equivalent to A+/A- (A1/A3), the amount of capital to be remunerated can be reduced to 4 % of the outstanding guarantees.

The normal remuneration of this capital is made up of a risk premium, possibly increased by the risk-free interest rate.

The risk premium must be paid to the State on the adequate amount of capital in all cases. Based on its practice, the Commission considers that a normal risk premium for equity amounts to at least 400 basis points and that such risk premium should be included in the guarantee premium charged to the beneficiaries <sup>(17)</sup>.

If, as in most State guarantee schemes, the capital is not provided to the scheme and therefore there is no cash contribution by the State, the risk-free interest rate does not have to be taken into account. Alternatively, if the underlying capital is effectively provided by the State, the State has to incur borrowing costs and the scheme benefits from this cash by possibly investing it. Therefore the risk-free interest rate has to be paid to the State on the amount provided. Moreover, this charge should be taken from the financial income of the scheme and does not necessarily have to impact the guarantee premiums <sup>(18)</sup>. The Commission considers that the yield of the 10-year government bond may be used as a suitable proxy for the risk-free rate taken as normal return on capital;

- (g) in order to ensure transparency, the scheme must provide for the terms on which future guarantees will be granted, such as eligible companies in terms of rating and, when applicable, sector and size, maximum amount and duration of the guarantees.

### 3.5. Valuation of guarantee schemes for SMEs

In view of the specific situation of SMEs and in order to facilitate their access to finance, especially through the use of guarantee schemes, two specific possibilities exist for such companies:

- the use of safe-harbour premiums as defined for individual guarantees to SMEs,
- the valuation of guarantee schemes as such by allowing the application of a single premium and avoiding the need for individual ratings of beneficiary SMEs.

<sup>(16)</sup> Corresponding to the capital requirements laid down in Article 75 of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ L 177, 30.6.2006, p. 1) read in conjunction with Annex VI (paragraph 41 onwards) thereto.

<sup>(17)</sup> For a guarantee to a BBB rated company amounting to 100, the reserves to be constituted thus amount to 8. Applying 400 basis points (or 4 %) to this amount results in annual capital costs of  $8 \% \times 4 \% = 0,32 \%$  of the guaranteed amount, which will impact the price of the guarantee accordingly. If the one-year default rate anticipated by the scheme for this company is, for instance, 0,35 % and the yearly administrative costs are estimated at 0,1 %, the price of the guarantee deemed as non-aid will be 0,77 % per year.

<sup>(18)</sup> In that case, and provided the risk-free rate is deemed to be 5 %, the annual cost of the reserves to be constituted will be, for the same guarantee of 100 and reserves of 8 to be constituted,  $8 \% \times (4 \% + 5 \%) = 0,72 \%$  of the guaranteed amount. Under the same assumptions (default rate of 0,35 % and administrative costs of 0,1 %), the price of the guarantee would be 0,77 % per year and an additional charge of 0,4 % should be paid by the scheme to the State.

The conditions of use of both rules are defined as follows:

*Use of safe-harbour premiums in guarantee schemes for SMEs*

In line with what is proposed for simplification purposes in relation to individual guarantees, guarantee schemes in favour of SMEs can also, in principle, be deemed self-financing and not constitute State aid if the minimum safe-harbour premiums set out in point 3.3 and based on the ratings of undertakings are applied <sup>(19)</sup>. The other conditions set out in points 3.4(a), (b) and (c) as well as in point 3.4(g) still have to be fulfilled, and the conditions set out in points 3.4(d), (e) and (f) are deemed to be fulfilled by the use of the minimum annual premiums set out in point 3.3.

*Use of single premiums in guarantee schemes for SMEs*

The Commission is aware that carrying out an individual risk assessment of each borrower is a costly process, which may not be appropriate where a scheme covers a large number of small loans for which it represents a risk pooling tool.

Consequently, where a scheme only relates to guarantees for SMEs and the guaranteed amount does not exceed a threshold of EUR 2,5 million per company in that scheme, the Commission may accept, by way of derogation from point 3.4(d), a single yearly guarantee premium for all borrowers. However, in order for the guarantees granted under such a scheme to be regarded as not constituting State aid, the scheme has to remain self-financing and all the other conditions set out in points 3.4(a), (b) and (c) as well as in points 3.4(e), (f) and (g) still have to be fulfilled.

### 3.6. No automatic classification as State aid

Failure to comply with any one of the conditions set out in points 3.2 to 3.5 does not mean that the guarantee or guarantee scheme is automatically regarded as State aid. If there is any doubt as to whether a planned guarantee or guarantee scheme constitutes State aid, it should be notified to the Commission.

## 4. GUARANTEES WITH AN AID ELEMENT

### 4.1. General

Where an individual guarantee or a guarantee scheme does not comply with the market economy investor principle, it is deemed to entail State aid. The State aid element therefore needs to be quantified in order to check whether the aid may be found compatible under a specific State aid exemption. As a matter of principle, the State aid element will be deemed to be the difference between the appropriate market price of the guarantee provided individually or through a scheme and the actual price paid for that measure.

The resulting yearly cash grant equivalents should be discounted to their present value using the reference rate, then added up to obtain the total grant equivalent.

When calculating the aid element in a guarantee, the Commission will devote special attention to the following elements:

- (a) whether in the case of individual guarantees the borrower is in financial difficulty. Whether in the case of guarantee schemes, the eligibility criteria of the scheme provide for exclusion of such undertakings (see details in point 3.2(a)).

The Commission notes that for companies in difficulty, a market guarantor, if any, would, at the time the guarantee is granted charge a high premium given the expected rate of default. If the likelihood that the borrower will not be able to repay the loan becomes particularly high, this market rate may not exist and in exceptional circumstances the aid element of the guarantee may turn out to be as high as the amount effectively covered by that guarantee;

<sup>(19)</sup> This includes the provision whereby for SMEs which do not have a credit history or a rating based on a balance sheet approach, the safe-harbour premium is set at 3,8 % but this can never be lower than the premium which would be applicable to the parent companies.

- (b) whether the extent of each guarantee can be properly measured when it is granted.

This means that the guarantees must be linked to a specific financial transaction, for a fixed maximum amount and limited in time. In this connection the Commission considers in principle that unlimited guarantees are incompatible with Article 87 of the Treaty;

- (c) whether the guarantee covers more than 80 % of each outstanding loan or other financial obligation (see details and exceptions in point 3.2(c)).

In order to ensure that the lender has a real incentive to properly assess, secure and minimise the risk arising from the lending operation, and in particular to assess properly the borrower's creditworthiness, the Commission considers that a percentage of at least 20 % not covered by a State guarantee should be carried by the lender <sup>(20)</sup> to properly secure its loans and to minimise the risk associated with the transaction. The Commission will therefore, in general, examine more thoroughly any guarantee or guarantee scheme covering the entirety (or nearly the entirety) of a financial transaction except if a Member State duly justifies it, for instance, by the specific nature of the transaction;

- (d) whether the specific characteristics of the guarantee and loan (or other financial obligation) have been taken into account when determining the market premium of the guarantee, from which the aid element is calculated by comparing it with the premium actually paid (see details in point 3.2(d)).

#### 4.2. Aid element in individual guarantees

For an individual guarantee the cash grant equivalent of a guarantee should be calculated as the difference between the market price of the guarantee and the price actually paid.

Where the market does not provide guarantees for the type of transaction concerned, no market price for the guarantee is available. In that case, the aid element should be calculated in the same way as the grant equivalent of a soft loan, namely as the difference between the specific market interest rate this company would have borne without the guarantee and the interest rate obtained by means of the State guarantee after any premiums paid have been taken into account. If there is no market interest rate and if the Member State wishes to use the reference rate as a proxy, the Commission stresses that the conditions laid down in the communication on reference rates <sup>(21)</sup> are valid to calculate the aid intensity of an individual guarantee. This means that due attention must be paid to the top-up to be added to the base rate in order to take into account the relevant risk profile linked to the operation covered, the undertaking guaranteed and the collaterals provided.

#### 4.3. Aid element in individual guarantees for SMEs

For SMEs, the simplified evaluation system outlined in point 3.3 can also be applied. In that case, if the premium for a given guarantee does not correspond to the value set as a minimum for its rating class, the difference between this minimum level and the premium charged will be regarded as aid. If the guarantee lasts more than a year, the yearly shortfalls are discounted using the relevant reference rate <sup>(22)</sup>.

Only in cases clearly evidenced and duly justified by the Member State concerned may the Commission accept a deviation from these rules. A risk-based approach still has to be respected in such cases.

#### 4.4. Aid element in guarantee schemes

For guarantee schemes, the cash grant equivalent of each guarantee within the scheme is the difference between the premium effectively charged (if any) and the premium that should be charged in an equivalent non-aid scheme set up in accordance with the conditions laid down in point 3.4. The aforementioned theoretical premiums from which the aid element is calculated have therefore to cover the normal risks

<sup>(20)</sup> This is based on the assumption that the corresponding level of security is provided by the company to the State and the credit institution.

<sup>(21)</sup> See the Communication referred to in footnote 11.

<sup>(22)</sup> See further details in footnote 14.

associated with the guarantee as well as the administrative and capital costs <sup>(23)</sup>. This way of calculating the grant equivalent is aimed at ensuring that, also over the medium and long term, the total aid granted under the scheme is equal to the money injected by the public authorities to cover the deficit of the scheme.

Since, in the case of State guarantee schemes, the specific features of the individual cases may not be known at the time when the scheme is to be assessed, the aid element must be assessed by reference to the provisions of the scheme.

Aid elements in guarantee schemes can also be calculated through methodologies already accepted by the Commission following their notification under a regulation adopted by the Commission in the field of State aid, such as Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid <sup>(24)</sup> or Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 <sup>(25)</sup>, provided that the approved methodology explicitly addresses the type of guarantees and the type of underlying transactions at stake.

Only in cases clearly evidenced and duly justified by the Member State concerned may the Commission accept a deviation from these rules. A risk-based approach still has to be respected in such cases.

#### 4.5. Aid element in guarantee schemes for SMEs

The two simplification tools outlined in point 3.5 and relating to guarantee schemes for SMEs can also be used for aid calculation purposes. The conditions of use of both rules are defined as follows:

##### *Use of safe-harbour premiums in guarantee schemes for SMEs*

For SMEs, the simplified evaluation system outlined above in point 3.5 can also be applied. In that case, if the premium for a given category in a guarantee scheme does not correspond to the value set as a minimum for its rating class <sup>(26)</sup>, the difference between this minimum level and the premium charged will be regarded as aid <sup>(27)</sup>. If the guarantee lasts more than a year, the yearly shortfalls are discounted using the reference rate <sup>(28)</sup>.

##### *Use of single premiums in guarantee schemes for SMEs*

In view of the more limited distortion of competition that may be caused by State aid provided in the framework of a guarantee scheme for SMEs, the Commission considers that if an aid scheme only relates to guarantees for SMEs, where the guaranteed amount does not exceed a threshold of EUR 2,5 million per company in this given scheme, the Commission may accept, by way of derogation from point 4.4, a valuation of the aid intensity of the scheme as such, without the need to carry out a valuation for each individual guarantee or risk class within the scheme <sup>(29)</sup>.

<sup>(23)</sup> This calculation can be summarised, for each risk class, as the difference between (a) the outstanding sum guaranteed, multiplied by the risk factor of the risk class ('risk' being the probability of default after inclusion of administrative and capital costs), which represents the market premium, and (b) any premium paid, i.e. (guaranteed sum × risk) – premium paid.

<sup>(24)</sup> OJ L 302, 1.11.2006, p. 29.

<sup>(25)</sup> OJ L 358, 16.12.2006, p. 3.

<sup>(26)</sup> This includes the possibility whereby SMEs which do not have a credit history or a rating based on a balance sheet approach, the safe-harbour premium is set at 3,8 % but this can never be lower than the premium which would be applicable to the parent company or companies.

<sup>(27)</sup> This calculation can be summarised, for each risk class, as the outstanding sum guaranteed multiplied by the difference between (a) the safe-harbour premium percentage of that risk class and (b) the premium percentage paid, i.e. guaranteed sum × (safe-harbour premium – premium paid).

<sup>(28)</sup> See further details in footnote 11.

<sup>(29)</sup> This calculation can be summarised, irrespective of the risk class, as the difference between (a) the outstanding sum guaranteed, multiplied by the risk factor of the scheme ('risk' being the probability of default after inclusion of administrative and capital costs), and (b) any premium paid, i.e. (guaranteed sum × risk) – premium paid.

## 5. COMPATIBILITY WITH THE COMMON MARKET OF STATE AID IN THE FORM OF GUARANTEES

### 5.1. General

State guarantees within the scope of Article 87(1) of the Treaty must be examined by the Commission with a view to determining whether or not they are compatible with the common market. Before such assessment of compatibility can be made, the beneficiary of the aid must be identified.

### 5.2. Assessment

Whether or not this aid is compatible with the common market will be examined by the Commission according to the same rules as are applied to aid measures taking other forms. The concrete criteria for the compatibility assessment have been clarified and detailed by the Commission in frameworks and guidelines concerning horizontal, regional and sectoral aid<sup>(30)</sup>. The examination will take into account, in particular, the aid intensity, the characteristics of the beneficiaries and the objectives pursued.

### 5.3. Conditions

The Commission will accept guarantees only if their mobilisation is contractually linked to specific conditions which may go as far as the compulsory declaration of bankruptcy of the beneficiary undertaking, or any similar procedure. These conditions will have to be agreed between the parties when the guarantee is initially granted. In the event that a Member State wants to mobilise the guarantee under conditions other than those initially agreed to at the granting stage, then the Commission will regard the mobilisation of the guarantee as creating new aid which has to be notified under Article 88(3) of the Treaty.

## 6. REPORTS TO BE PRESENTED TO THE COMMISSION BY THE MEMBER STATES

In accordance with general monitoring obligations<sup>(31)</sup>, in order to further monitor new developments on the financial markets and since the value of State guarantees is difficult to assess and changes over time, the constant review, pursuant to Article 88(1) of the Treaty, of State guarantee schemes approved by the Commission is of particular importance. Member States shall therefore submit reports to the Commission.

For aid guarantee schemes, these reports will have to be presented at least at the end of the period of validity of the guarantee scheme and for the notification of an amended scheme. The Commission may however consider it appropriate to request reports on a more frequent basis, depending on the case.

For guarantee schemes, for which the Commission has taken a non-aid decision, and especially when no solid historic data exists for the scheme, the Commission may request, when taking its non-aid decision for such reports to be presented, thereby clarifying on a case-by-case basis the frequency and the content of the reporting requirement.

Reports should include at least the following information:

- (a) the number and amount of guarantees issued;
- (b) the number and amount of guarantees outstanding at the end of the period;
- (c) the number and value of defaulted guarantees (displayed individually) on a yearly basis;
- (d) the yearly income:
  1. income from the premiums charged;
  2. income from recoveries;
  3. other revenues (e.g. interest received on deposits or investments);

<sup>(30)</sup> See Competition law applicable to State aid in the European Community:  
[http://ec.europa.eu/comm/competition/state\\_aid/legislation/legislation.html](http://ec.europa.eu/comm/competition/state_aid/legislation/legislation.html)  
For sector specific State aid legislation, see for agriculture:  
[http://ec.europa.eu/agriculture/stateaid/leg/index\\_en.htm](http://ec.europa.eu/agriculture/stateaid/leg/index_en.htm)  
and for transport:  
[http://ec.europa.eu/dgs/energy\\_transport/state\\_aid/transport\\_en.htm](http://ec.europa.eu/dgs/energy_transport/state_aid/transport_en.htm)

<sup>(31)</sup> Such as those laid down in particular by 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 (OJ L 140, 30.4.2004, p. 1). Regulation as last amended by Regulation (EC) No 271/2008 (OJ L 82, 25.3.2008, p. 1).

- (e) the yearly costs:
  - 1. administrative costs;
  - 2. indemnifications paid on mobilised guarantees;
- (f) the yearly surplus or shortfall (difference between income and costs); and
- (g) the accumulated surplus or shortfall since the beginning of the scheme <sup>(32)</sup>.

For individual guarantees, the relevant information, mainly that referred to in points (d) to (g), should be similarly reported.

In all cases, the Commission draws the attention of Member States to the fact that correct reporting at a remote date presupposes correct collection of the necessary data from the beginning of the use of the scheme and their aggregation on a yearly basis.

The attention of Member States is also drawn to the fact that for non-aid guarantees provided individually or under a scheme, although no notification obligation exists, the Commission may have to verify that the guarantee or scheme does not entail aid elements, for instance following a complaint. In that case, the Commission will request information similar to that set out above for reports from the Member State concerned.

Where reports already have to be presented following specific reporting obligations established by block exemption regulations, guidelines or frameworks applicable in the State aid field, those specific reports will replace the reports to be presented under the present guarantee reporting obligation provided the information listed above is included.

#### 7. IMPLEMENTING MEASURES

The Commission invites Member States to adjust their existing guarantee measures to the stipulations of the present Notice by 1 January 2010 as far as new guarantees are concerned.

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<sup>(32)</sup> If the scheme has been active for more than 10 years, only the last 10 annual amounts of shortfall or surplus are to be provided.

## CORRIGENDA

**Corrigendum to Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees***(Official Journal of the European Union C 155 of 20 June 2008)*

(2008/C 244/11)

On page 15, in point 3.3 'Valuation of individual guarantees for SMEs', the table is replaced by the following:

'Credit quality	Standard & Poor's	Fitch	Moody's	Annual safe harbour premium
Highest quality	AAA	AAA	Aaa	0,4 %
Very strong payment capacity	AA +	AA +	Aa 1	0,4 %
	AA	AA	Aa 2	
	AA –	AA –	Aa 3	
Strong payment capacity	A +	A +	A 1	0,55 %
	A	A	A 2	
	A –	A –	A 3	
Adequate payment capacity	BBB +	BBB +	Baa 1	0,8 %
	BBB	BBB	Baa 2	
	BBB –	BBB –	Baa 3	
Payment capacity is vulnerable to adverse conditions	BB +	BB +	Ba 1	2 %
	BB	BB	Ba 2	
Payment capacity is likely to be impaired by adverse conditions	BB –	BB –	Ba 3	3,8 %
	B +	B +	B 1	
	B	B	B 2	
B –	B –	B 3		
Payment capacity is dependent upon sustained favourable conditions	CCC +	CCC +	Caa 1	No safe-harbour annual premium can be provided
	CCC	CCC	Caa 2	
	CCC –	CCC –	Caa 3	
	CC	CC		
	C	C		
In or near default	SD	DDD	Ca	No safe-harbour annual premium can be provided'
	D	DD	C	
		D		

**Commission Communication on State aid elements in sales of land and buildings by public authorities**

(97/C 209/03)

(Text with EEA relevance)

**I. INTRODUCTION**

On a number of occasions in recent years the Commission has investigated sales of publicly owned land and buildings in order to establish whether there was an element of State aid in favour of the buyers. The Commission has drawn up general guidance to Member States in order to make its general approach with regard to the problem of State aid through sales of land and buildings by public authorities transparent and to reduce the number of cases it has to examine.

The following guidance to Member States:

- describes a simple procedure that allows Member States to handle sales of land and buildings in a way that automatically precludes the existence of State aid,
- specifies clearly cases of sales of land and buildings that should be notified to the Commission to allow for assessment of whether or not a certain transaction contains aid and, if so, whether or not the aid is compatible with the common market,
- enables the Commission to deal expeditiously with any complaints or submissions from third parties drawing its attention to cases of alleged aid connected to sales of land and buildings.

This guidance takes account of the fact that in most Member States budgetary provisions exist to ensure that public property is in principle not sold below its value. Therefore, the procedural precautions recommended to avoid State aid rules coming into play are formulated in a way that should normally allow Member States to comply with the guidance without changing their domestic procedures.

The guidance concerns only sales of publicly owned land and buildings. It does not concern the public acquisition of land and buildings or the letting or leasing of land and buildings by public authorities. Such transactions may also include State aid elements.

The guidance does not affect specific provisions or practices of Member States intended to promote the quality of and access to private housing.

**II. PRINCIPLES**

**1. Sale through an unconditional bidding procedure**

A sale of land and buildings following a sufficiently well-publicized, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid is *by definition* at market value and consequently does not contain State aid. The fact that a different valuation of the land and buildings existed prior to the bidding procedure, e.g. for accounting purposes or to provide a proposed initial minimum bid, is irrelevant.

- (a) An offer is 'sufficiently well-publicized' when it is repeatedly advertised over a reasonably long period (two months or more) in the national press, estate gazettes or other appropriate publications and through real-estate agents addressing a broad range of potential buyers, so that it can come to the notice of all potential buyers.

The intended sale of land and buildings, which in view of their high value or other features may attract investors operating on a Europe-wide or international scale, should be announced in publications which have a regular international circulation. Such offers should also be made known through agents addressing clients on a Europe-wide or international scale.

- (b) An offer is 'unconditional' when any buyer, irrespective of whether or not he runs a business or of the nature of his business, is generally free to acquire the land and buildings and to use it for his own purposes. Restrictions may be imposed for the prevention of public nuisance, for reasons of environmental protection or to avoid purely speculative bids. Urban and regional planning restrictions imposed on the owner pursuant to domestic law on the use of the land and buildings do not affect the unconditional nature of an offer.
- (c) If it is a condition of the sale that the future owner is to assume special obligations — other than those arising from general domestic law or decision of the planning authorities or those relating to the general protection and conservation of the environment and to public health —



for the benefit of the public authorities or in the general public interest, the offer is to be regarded as 'unconditional' within the meaning of the above definition only if all potential buyers would have to, and be able to, meet that obligation, irrespective of whether or not they run a business or of the nature of their business.

## 2. Sale without an unconditional bidding procedure

### (a) *Independent expert evaluation*

If public authorities intend not to use the procedure described under 1, an independent evaluation should be carried out by one or more independent asset valuers prior to the sale negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards. The market price thus established is the minimum purchase price that can be agreed without granting State aid.

An 'asset valuer' is a person of good repute who:

- has obtained an appropriate degree at a recognized centre of learning or an equivalent academic qualification,
- has suitable experience and is competent in valuing land and buildings in the location and of the category of the asset.

If in any Member State there are not appropriate established academic qualifications, the asset valuer should be a member of a recognized professional body concerned with the valuation of land and buildings and either:

- be appointed by the courts or an authority of equivalent status,
- have as a minimum a recognized certificate of secondary education and sufficient level of training with at least three years post-qualification practical experience in, and with knowledge of, valuing land and buildings in that particular locality.

The valuer should be independent in the carrying out of his tasks, i.e. public authorities should not be entitled to issue orders as regards the result of the valuation. State valuation offices and public officers or employees are to be regarded as independent provided that undue influence on their findings is effectively excluded.

'Market value' means the price at which land and buildings could be sold under private contract between a willing seller and an arm's length buyer on the date of valuation, it being assumed that the property is publicly exposed to the market, that market conditions permit orderly disposal and that a normal period, having regard to the nature of the property, is available for the negotiation of the sale <sup>(1)</sup>.

### (b) *Margin*

If, after a reasonable effort to sell the land and buildings at the market value, it is clear that the value set by the valuer cannot be obtained, a divergence of up to 5% from that value can be deemed to be in line with market conditions. If, after a further reasonable time, it is clear that the land and buildings cannot be sold at the value set by the valuer less this 5% margin, a new valuation may be carried out which is to take account of the experience gained and of the offers received.

### (c) *Special obligations*

Special obligations that relate to the land and buildings and not to the purchaser or his economic activities may be attached to the sale in the public interest provided that every potential buyer is required, and in principle is able, to fulfil them, irrespective of whether or not he runs a business or of the nature of his business. The economic disadvantage of such obligations should be evaluated separately by independent valuers and may be set off against the purchase price. Obligations whose fulfilment would at least partly be in the buyer's own interest should be evaluated with that fact in mind: there may, for example, be an advantage in terms of advertising, sport or arts sponsorship, image, improvement of the buyer's own environment, or recreational facilities for the buyer's own staff.

The economic burden related to obligations incumbent on all landowners under the ordinary law are not to be discounted from the purchase price (these would include, for example, care and maintenance of the land and buildings as part of the ordinary social obligations of property ownership or the payment of taxes and similar charges).

### (d) *Cost to the authorities*

The primary cost to the public authorities of acquiring land and buildings is an indicator for the market value unless a significant period of

<sup>(1)</sup> Article 49 (2) of Council Directive 91/674/EEC (OJ No L 374, 31. 12. 1991, p. 7).

time elapsed between the purchase and the sale of the land and buildings. In principle, therefore, the market value should not be set below primary costs during a period of at least three years after acquisition unless the independent valuer specifically identified a general decline in market prices for land and buildings in the relevant market.

### 3. Notification

Member States should consequently notify to the Commission, without prejudice to the *de minimis* rule<sup>(1)</sup>, the following transactions to allow it to establish whether State aid exists and, if so, to assess its compatibility with the common market.

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<sup>(1)</sup> OJ No C 68, 6. 3. 1996, p. 9.

(a) any sale that was not concluded on the basis of an open and unconditional bidding procedure, accepting the best or only bid; and

(b) any sale that was, in the absence of such procedure, conducted at less than market value as established by independent valuers.

### 4. Complaints

When the Commission receives a complaint or other submission from third parties alleging that there was a State aid element in an agreement for the sale of land and buildings by public authorities, it will assume that no State aid is involved if the information supplied by the Member State concerned shows that the above principles were observed.

European Commission

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